UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

June 12, 1998

UNITED STATES OF AMERICA, Complainant, v. PEDRO DOMINGUEZ, Respondent.	8 U.S.C. § 1324c Proceeding OCAHO Case No. 96C00027

NOTIFICATION OF FINAL AGENCY ORDER

On May 15, 1998, the Honorable Robert L. Barton, the Administrative Law Judge (ALJ) in the above-styled proceeding, issued a Final Decision and Order. On June 2, 1998, Complainant filed a "Request to The Chief Administrative Hearing Officer For Review Of The Administrative Law Judge's Final Decision and Order and Modification in Part."

I have reviewed the Administrative Law Judge's Final Decision and Order and have determined not to modify or vacate that order. Pursuant to 28 C.F.R. § 68.53(a)(2), the ALJ's Final Decision and Order will become a final agency order on June 15, 1998.

June 12, 1998

Jack E. Perkins
Chief Administrative Hearing Officer

UNITED STATES DEPARTMENT OF JUSTICE
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UNITED STATES OF AMERICA, Complainant, v. PEDRO DOMINGUEZ, Respondent.	8 U.S.C. § 1324c Proceeding OCAHO Case No. 96C00027 Judge Robert L. Barton, Jr.

FINAL DECISION AND ORDER OF ADMINISTRATIVE LAW JUDGE ROBERT L. BARTON, JR.

Issued May 15, 1998

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FINAL DECISION AND ORDER

(May 15, 1998)

I. BACKGROUND AND PROCEDURAL HISTORY

A two-count Complaint charging civil document fraud under section 274C of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324c, and seeking a civil money penalty in the amount of $412,000, was filed on March 4, 1996. Count I of the Complaint alleges that Pedro Dominguez (Dominguez or Respondent) knowingly forged, counterfeited, altered, and falsely made 103 INS departure records (I-94 forms) in violation of 8 U.S.C. § 1324c(a)(1). Compl.[1] ¶¶ I.A-D.[2]

[1] The following abbreviations will be used throughout this Decision and Order:

Compl.	Complainant's Complaint, as amended
Ans.	Respondent's Answer, as amended, unless otherwise noted
NIF	Notice of Intent to Fine
Double Jeop. Order	Order Granting Complainant's Motion to Strike Respondent's Double Jeopardy Defense
C. Mot. SD	Complainant's Motion for Summary Decision
SD Order	Order Partially Granting Complainant's Motion for Summary Decision
PHC(1) Tr.	Transcript of first prehearing conference, held April 1, 1997
PHC(2) Tr.	Transcript of second prehearing conference, held July 30, 1997
PHC(3) Tr.	Transcript of final prehearing conference, held December 18, 1997
C. Disputed Issues	Complainant's Statement of Disputed Issues, filed November 12, 1997
Agreed Final PHO	Agreed Final Prehearing Order, filed jointly January 12, 1998
FPO	Final Prehearing Order, issued January 13, 1998

(continued...)

Count I seeks the maximum penalty of $2,000 per violation for a total requested Count I penalty of $206,000. Count II of the Complaint alleges that Respondent used, attempted to use, possessed, and provided the same I-94 forms referenced in Count I knowing that such documents were forged, counterfeit, altered, and falsely made, in violation of 8 U.S.C. § 1324c(a)(2). Compl. ¶¶ II.A-D. Count II also seeks the maximum penalty of $2,000 per violation for a total requested Count II penalty of $206,000.

On April 3, 1996, Respondent filed an Answer to the Complaint in which he admitted certain allegations concerning jurisdiction and the parties, see Ans. at 1,[3] but denied all the allegations contained in both Counts I and II, Ans. at 1-2.[4] Respondent also asserted several affirmative defenses in the April 3 Answer, including defenses that the Complainant's claims were barred by the

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[1](...continued)

Tr.	Transcript of hearing, held January 20-21, 1998
CX	Complainant's Exhibit
RX	Respondent's Exhibit
Cbr.	Complainant's posthearing brief
Rbr.	Respondent's posthearing brief
CPFF	Complainant's proposed finding of fact
RPFF	Respondent's proposed finding of fact
CPCL	Complainant's proposed conclusion of law
RPCL	Respondent's proposed conclusion of law

[2] On May 14, 1996, Complainant moved to amend the Complaint to correct certain typographical errors, and I granted Complainant's motion by Order dated May 29, 1996. Any reference or citation to the Complaint refers to the amended version.

[3] During the final prehearing conference, I granted Respondent's motion to amend his answer to add as a defense to the requested civil money penalty Respondent's inability to pay that amount. See PHC(3) Tr. at 6. Consequently, Respondent's Third Amended Answer, filed August 29, 1997, was accepted; hereinafter, any reference or citation to Respondent's Answer refers to the Third Amended Answer, unless otherwise noted. This Answer also raises as a defense the argument that assessing fines for the allegations of both Counts I and II amounts to an unconstitutional double punishment for the same actions, in violation of the double jeopardy clause.

[4] In the Third Amended Answer, however, Respondent admitted the factual allegations contained in Count I, but denied the legal conclusion therein; he also denied all the allegations of Count II, except to the extent that he possessed documents in connection with his creation of those documents.

double jeopardy clause of the Fifth Amendment to the United States Constitution[5] and by the excessive fines clause of the Eighth Amendment to the United States Constitution. Ans. at 2-3. On July 1, 1996, I granted Complainant's motion to strike Respondent's double jeopardy defense, and I certified the order to the Chief Administrative Hearing Officer (CAHO) for interlocutory review pursuant to 28 C.F.R. § 68.53(d)(l)(i). On July 19, 1996, the CAHO issued a notice that he would not modify or vacate the interlocutory order striking the affirmative defense of double jeopardy and that, pursuant to 28 C.F.R. § 68.53(d), the Order would be deemed adopted.

On July 23, 1996, I issued an order denying Complainant's motion to strike Respondent's excessive fines defense, but also denying Respondent's motion for summary decision based on that defense, noting that the issue was premature, since the question of whether the penalty sought by Complainant would in fact violate the excessive fines clause must be left for the hearing when evidence and testimony would be presented on the issue of the appropriate penalty.

Pursuant to the Rules of Practice, discovery was commenced, and, on January 31, 1997, Complainant filed a motion for summary decision as to both liability and penalty. Respondent filed its opposition to the motion, and, after affording the parties an opportunity to submit supplemental pleadings and hearing oral argument on the motion, on October 17, 1997, I granted in part and denied in part Complainant's motion for summary decision. As to Count I, I granted the motion that Respondent counterfeited the documents listed at paragraphs 1-23, 25-51, 53-59, 61-74, 76-87, and 90-103, in violation of 8 U.S.C. § 1324c(a)(1). I also found that Respondent forged, as well as counterfeited, the documents listed in paragraphs 2, 3, and 25-28, in violation of 8 U.S.C. § 1324c(a)(1). The motion was denied as to the allegation that the documents were altered or falsely made. I also denied the motion in its entirety as to the documents referenced in paragraphs 24, 52, 60, 75, 88, and 89.

As to Count II, I found that, with respect to the I-94 documents referenced in paragraphs 3, 8, 12-13, 18-19, 25-26, 29-37, 43-49, 53-59, 64-67, 70-72, 76-77, 80, 83, 87, 90, 93-95, 98-100, and 103, Respondent had illegally provided the documents in violation of 8 U.S.C. § 1324c(a)(2), in order to satisfy a requirement of the Act, and, therefore, granted summary decision as to liability. I denied Complainant's motion for summary decision as to the other allegations of Count II respecting liability.

Finally, since there were genuine disputed issues of material fact remaining as to the civil money penalty issues, Complainant's motion was denied as to penalty for both Counts I and II.

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[5] Respondent already had been arrested, indicted, and prosecuted for criminal violations in connection with possessing, forging, and counterfeiting immigration documents. United States v. Pedro Dominguez, (W.D. Tex. Laredo Div. No. L-93-181-S). Based on a plea agreement, Respondent pled guilty to one count of the indictment. Subsequently, he was sentenced to prison and ordered to pay a fine of $15,000, pursuant to the Judgment of the Court entered August 5, 1994. See CX-OO (Judgment of the Court); CX-PP-42 (transcript of sentence).

Complainant appealed this interlocutory ruling to the CAHO, who took review and, on November 14, 1997, clarified his earlier rulings in United States v. Remileh, 5 OCAHO 15 (Ref. No. 724)[6] (1995), 1995 WL 139207,[7] appeal denied, No. 96-1142 (8th Cir. 1996), and United States v. Noorealam, 5 OCAHO 611 (Ref. No. 797) (1995), 1995 WL 714435. The CAHO ruled that the ninety-seven documents listed at paragraphs 1-23, 25-51, 53-59, 61-74, 76-87 and 90-103 of Count I of the Complaint, which I already had found were counterfeit and, thus, in violation of 8 U.S.C. § 1324c(a)(1), also were falsely made. The CAHO also held that, although the statutory language does not expressly permit the imposition of civil money penalties for "possessing" or "providing" documents in violation of section 1324c, civil money penalties must be assessed in such instances.[8]

Since I was ruling only on Complainant's motion for summary decision, I did not enter judgment for Respondent as to the allegations of the Complaint on which the motion was denied. However, in response to my further orders, Complainant acknowledged in its Statement of Disputed Issues, filed November 12, 1997, that it did not intend to offer any further evidence to show that the I-94 documents referenced in paragraphs 24, 52, 60, 75, 88 and 89 of Count I were counterfeited, altered, forged, or falsely made. Complainant also acknowledged that it did not intend to offer further evidence to show use or attempted use of the I-94 forms referenced in Count II. Additionally, Complainant stated that it did not intend to offer further evidence that Respondent provided the I-94 forms in Count II, with the exception of the I-94 forms referenced in paragraphs 2, 27, and 28.

Based on Complainant's statements that it did not intend to offer further evidence on those points, I rendered final rulings on certain liability issues during the final prehearing conference held December 18, 1997. See PHC(3) Tr. at 24-25. In particular, I rendered judgment for Respondent as to Count I, paragraphs 24, 52, 60, 75, 88 and 89, PHC(3) Tr. at 25, and I also rendered judgment

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[6] Citations to OCAHO precedents in bound Volumes 1-2, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of the United States, and bound Volumes 3-5, Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Laws of the United States, reflect consecutive decision and order reprints within those bound volumes; pinpoint citations to pages within those issuances are to specific pages, seriatim, of the pertinent volume. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume 5, however, are to pages within the original issuances.

[7] If available, parallel Westlaw citations will be given to OCAHO decisions. OCAHO decisions published in Westlaw are located in the "FIM-OCAHO" database.

[8] The statute later was amended so that it now expressly permits imposition of civil money penalties for all section 1324c(a) violations. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 212(c), 110 Stat. 3009 (codified at 8 U.S.C. § 1324c(d)(3) (Supp. II 1996)). However, the amended statute is not applicable to the violations in this case, which occurred prior to the effective date of the amendments, which is September 30, 1996.

for Respondent as to the allegation in Count II that Respondent used or attempted to use the documents in question, PHC(3) Tr. at 24-25. The parties were informed that those were final rulings pursuant to 28 C.F.R. § 68.52. PHC(3) Tr. at 25. Based on the corrections to the Addendum of the Order Partially Granting Complainant's Motion for Summary Decision, I rendered judgment for Complainant on the allegations in Count II, paragraphs 2, 27 and 28, that Respondent provided those documents. PHC(3) Tr. at 25-26. Neither party appealed from those final rulings pursuant to 28 C.F.R. § 68.52.

After the final prehearing conference, the only remaining unadjudicated disputed issue as to liability was whether Respondent "possessed" the I-94 forms referenced in Count II of the Complaint, as that term is used in 8 U.S.C. § 1324c(a)(2). In my Order Partially Granting Complainant's Motion for Summary Decision, I concluded that, although Respondent did counterfeit the documents, Complainant had failed to prove that Respondent "possessed" the documents within the meaning of 8 U.S.C. § 1324c(a)(2). In particular, Complainant had failed to produce any evidence of custody and control beyond the transient possession of the documents incident to the counterfeiting process. Subsequently, in Complainant's Statement of Disputed Issues, filed November 12, 1997, Complainant stated that it did not intend to offer evidence at the evidentiary hearing on any issue involving liability other than the Count II allegation that Respondent possessed the documents in violation of section 1324c(a)(2). As to that issue, Complainant stated that it "does plan to present further evidence that Respondent's retention, custody and control at times after the completion of the manufacturing does constitute **possession** within the meaning of 8 U.S.C. Section 1324c(a)(2)." C. Statement Disputed Issues at 2 (emphasis in original). However, later in the proposed final prehearing order, filed jointly on January 12, 1998, the parties referenced this issue as a disputed legal issue (not a factual issue), see Agreed Final PHO at 2, and Complainant candidly acknowledged at the end of the hearing that it had not produced any evidence on this issue during the hearing, Tr. at 533-34. Therefore, the only issue on which evidence was presented during the hearing was the appropriate penalty.

During the final prehearing conference, the date for the evidentiary hearing was set to commence on January 20, 1998, in San Antonio, Texas. The evidentiary hearing began on January 20, 1998, in San Antonio, Texas, and was completed on January 21.

At the conclusion of the hearing the record was closed pursuant to 28 C.F.R. § 68.49. Tr. at 527-28. After the hearing transcript was received, I gave the parties leave to file motions to correct the hearing transcript, and, on March 11, 1998, I issued an order correcting the transcript. The parties requested and were given leave to file posthearing briefs, and I set March 19, 1998, as the deadline for submission of said briefs. On March 19, both parties filed posthearing briefs, which included proposed findings of fact and conclusions of law.

The record on which this decision is based consists of the record exhibits,[9] the testimony reflected in the hearing transcript, the transcripts of the prehearing conferences, the parties' stipulations, and the orders and pleadings filed in this case. To the extent that the parties made reference in their briefs to any matters not included in the official record, such references will not be considered. Since the record has been closed and the hearing transcript and briefs have been received, the case is ripe for decision as to the remaining unadjudicated issues. This constitutes the decision and order of the Administrative Law Judge pursuant to 28 C.F.R. § 68.52.

II. REMAINING DISPUTED FACTUAL AND LEGAL ISSUES

A. Disputed Factual Issues[10]

1. The capacity of the Respondent to pay the fine.

2. The breadth of Respondent's illegal activities or conduct regarding the manufacture and transfer of forged, counterfeited or falsely made immigration documents.

3. The motivations of Respondent to engage in the illegal activities made the basis of this action.

4. The amount of compensation received by Respondent in connection with the forgery, counterfeiting, false making and transfer of immigration documents.

5. The cooperation of the Respondent with the investigation.

6. The factual support for the fine amount established by the INS.

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[9] The court reporter has included all of Respondent's exhibits, both potential exhibits as well as exhibits admitted into evidence, in the official volume of Respondent's exhibits. However, only those exhibits actually admitted in evidence are part of the official record and may be relied upon by the parties. Those exhibits are CX-A-I, O, Q, BB-ZZ, and AAA-CCC, and RX-D, I, LL, RR, SS, TT, and UU. The following exhibits that are included in the court reporter's compilation were not received in evidence and, consequently, will not be considered in this case: RX-B, J, K, L, M, N, O, P, U, BB, CC, MM, NN, VV, WW, XX and YY.

[10] The disputed factual issues set forth here are the same as those in the Final Prehearing Order issued on January 13, 1998, which was based on the Agreed Prehearing Order signed and submitted by both parties.

B. Disputed Legal Issues

1. That the facts justify the imposition of the penalties against Respondent for possession of forged, counterfeited or falsely made documents in addition to imposition of penalties for the forgery, counterfeiting or false making thereof.

2. That the INS fine against Respondent was legally presumptively proper.

3. That possession of forged, counterfeited or falsely made documents in connection with the forgery, counterfeiting or false making thereof constitutes possession pursuant to section 1324c(a)(2).

C. Disputed Mixed Questions of Law and Fact

1. The amount of the civil money penalty to be imposed on Respondent.

2. Whether the amount of the civil money penalty, when established, violates the prohibition of excessive fines as provided for in the Eighth Amendment.

Further, Respondent has raised as an affirmative defense whether the double punishment for possession of forged, counterfeited or falsely made documents, in addition to imposition of penalties for forgery, counterfeiting or false making thereof, violates the double jeopardy provisions of the Fifth Amendment to the United States Constitution. See Fourth Affirmative Defense of Respondent's Third Amended Answer.

III. FACT FINDINGS

A. Parties' Proposed Findings

As part of their briefs, the parties have submitted proposed fact findings. I have reviewed those findings and have adopted some, but not all, of them by incorporating them in this section. This section reflects my own fact findings based on my independent review of the record, as well as my adoption, in whole or in part, of certain of the parties' proposed fact findings.

In reviewing the parties' proposed fact findings, I have found that some of Complainant's proposed findings are partially wrong, erroneously cited, or misleading. For example, CPFF I.8 states that "[t]he bed and breakfast has five rooms and cottages that could be rented out, [HTr. 472, line 24.]" See Cbr. 24 (emphasis added). The transcript states on page 472, lines 22-24, "Q So it's available -- at least five rooms are available to be rented out. Isn't that correct? A It's got five rooms at least." There is no mention in this cite that the cottages are available to be rented out; therefore, the proposed fact finding and/or the given citation is partially incorrect. In CPFF I.11, Complainant states that, "[w]hile Respondent still lives at the bed and breakfast, he claims Bertha Dominguez (ever since the divorce) lives at Winfield's Motel [HTr. 471, line 3. HTr. 500, line 21.]"

See Cbr. 25. Transcript page 471, line 3, states a question posed by Complainant's attorney regarding whether Bertha Dominguez has lived at the Boerne Stage Road property since the divorce. Complainant's citation does not include an answer by Respondent. Transcript page 500, lines 19-21, states, "Q Since the divorce, has Bertha lived at the Boerne Stage Road property at any time? A No, sir." Neither cited portion mentions anything about where Bertha Dominguez has been living since the divorce.

In other instances, Complainant provides only partial support for its proposed fact finding. For example, CPFF I.18 states that, "[i]n the [divorce] settlement, Respondent only received six of the seventeen properties that he listed [for the purpose of his presentence report] in 1994. [HTr. 427, line 6, HTr. 429, line 24, HTr. 437, line 2, HTr. 480, lines 13, 18-20.]" See Cbr. 26. The portions of the hearing transcript Complainant cites, however, only mention three of the properties Respondent received pursuant to the divorce settlement, not six like the proposed fact finding claims. On other occasions, Complainant simply has listed a citation that is clearly erroneous. In CPFF I.20, Complainant cites to RX-XX-2-3 and RX-XX-7, see Cbr. 27, but RX-XX, which only consists of one page anyway, was not admitted into evidence. From the context of the proposed fact finding, it seems that Complainant intended to cite to RX-SS-2-3 and RX-SS-7. Also, Complainant cites transcript page 18, line 25, for the proposition in CPFF I.22 that "'Winfield's' refers to both a restaurant and motel." See Cbr. 28. That transcript page mentions nothing about Winfield's.

Many of Complainant's proposed findings are conclusory and argumentative, the substance of which would have been more appropriate for inclusion in the body of the brief, rather than in the proposed fact findings. In CPFF I.21, Complainant asks that I find, based on transcript page 505, line 13, that "Respondent's lopsided divorce settlement is extremely questionable given that he has never provided his 1996 tax returns or any other more recent financial statement to the Complainant or the Court." See Cbr. at 27. In response to a question as to whether he had turned over the 1995 or 1996 tax returns, see Tr. at 505, ll.11-12, Respondent said he did not recall providing his 1996 tax returns to anyone.[11]

The above are only some of the problems with the Complainant's proposed findings. Therefore, I have not expressly adopted any of Complainant's proposed findings in this Final Decision and Order.

B. Decisional Findings

The investigation surrounding this case began on September 23, 1993, with the arrest of two Mexican nationals, Jorge Lopez-Hernandez and Francisca Martin-Morales, in Laredo, Texas, at the point of entry into the United States from Mexico. CX-A-1. These two individuals attempted to enter the United States using counterfeit I-94 forms, and they subsequently identified Julian Banda-Becerra (Banda) as the person who sold them the counterfeit documents. CX-A-1. Mr. Banda was an INS confidential informant (CI) working for Agent Victor Villarreal up until

[11] Respondent's answer was "I do not recall it myself." Tr. at 505, l.13.

Dominguez' arrest, Tr. at 195-96, which occurred September 23, 1993, CX-A-1. When interrogated about the counterfeit documents, Banda admitted that he had provided them to the aliens; Banda also identified Dominguez as the source for those documents. See Tr. at 172, ll.23-25; Tr. at 173, ll.1-23. Banda was told by INS Supervisory Special Agent Joseph De La Cruz that he would not be prosecuted if he told the truth. Tr. at 214, ll.12-25; Tr. at 215, ll.1-8. Banda already had admitted his part in the scheme by the time De La Cruz got to the office. Tr. at 214, ll.19-22. Banda agreed to cooperate with the government and arranged to make a controlled purchase of three counterfeit I-94 forms from Dominguez. CX-A-1. Dominguez was arrested on September 23, 1993, after delivering the three counterfeit I-94 forms to Banda. CX-A-1.

Dominguez was an employee of the INS from 1969, see CX-VV-25, 59, until September 18, 1993, when he retired from federal service, see CX-A-1.[12] He worked as a Border Patrol Agent and, since September 1976, as an agent with the Anti-Smuggling Unit (ASU). See Tr. at 13, ll.11-23 (Dominguez became an anti-smuggling agent in September 1976); CX-A-1 (Dominguez retired as an anti-smuggling agent). As an INS agent, Respondent was a law enforcement officer, and was issued a badge and a gun. Tr. at 15, ll.10-16. Respondent's primary duty as a law enforcement officer was to enforce the immigration laws. Tr. at 15, ll.2-9, 17-23.

Respondent had the most years in service at the Laredo ASU. Tr. at 16, ll.10-12. As an ASU agent, Respondent did not have to wear a uniform and was paid more than his Border Patrol counterparts. See Tr. at 19, ll.10-22. Also, as an ASU agent, Respondent was entrusted by the INS with substantial responsibility to operate independently without direct supervision most of the time. See Tr. at 19, ll.23-25; Tr. at 20, ll.1-20. It was left up to the individual ASU agent to recruit the CI, get him paroled, and work with him. See Tr. at 20, ll.17-25; Tr. at 21, ll.1-25; Tr. at 22, ll.1-10. Respondent knew he had to comply with INS policy and procedure in dealing with CIs, but no one really monitored his activities with CIs. See Tr. at 22, ll.11-22.

Banda, a citizen of Mexico, was an informant for Border Patrol, Customs, and Crimestoppers for more than ten years. Tr. at 78, l.25; Tr. at 79, ll.1, 15-25; Tr. at 80, ll.1-5. In fact, he was an INS informant for approximately eighteen years.[13] Tr. at 80, ll.16-20. The purpose of CIs was to provide information. Tr. at 24, ll.6-10. Dominguez recruited CIs Fausto Camacho and Dario Madera-Hernandez (Madera). Tr. at 23, ll.16-25. Dominguez initiated the counterfeiting operation, see Tr. at 84, ll.2-3 (Banda's testimony that it was Dominguez' idea to sell these documents), and provided fraudulent documents for sale to government informants, such as Banda, Camacho,

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[12] At trial, Respondent estimated his length of employment with INS at approximately 27 years, Tr. at 12, but, given the specific starting and ending years of his INS employment, it seems that Respondent actually worked at the INS for approximately 24 years.

[13] As of September 1993, Banda had worked with Agent Villarreal for about 11 or 12 years. CX-D-1. Agent Villarreal estimates that Banda became a confidential informant for him around 1986, Tr. at 194. Agent Villarreal had secured an I-94 form for Banda. CX-D-1.

and Madera, as well as to former informant Arturo Perez, see Tr. at 29, ll.2-22; Tr. at 32, ll.5-25; Tr. at 33, ll.1-4. Dominguez provided I-94s to Camacho, who was in Dallas. Tr. at 93, ll.3-11.

Dominguez was aware that informants worked with criminals. See Tr. at 67, ll.18-23. He also knew that Madera had been in jail in Mexico, Tr. at 53, ll.23-24; Tr. at 67, ll.8-10, and he indicated that Camacho had a sordid history, see Tr. at 67, ll.11-13. Respondent admits that he did not know who the end users of the I-94s were, and that he did not ask whether they were terrorists or criminals. See Tr. at 66, ll.23-25; Tr. at 67, ll.1-7; Tr. at 68, ll.3-6.

Banda requested money from Respondent on several occasions and received loans from Respondent. See Tr. at 41, ll.14-21; Tr. at 42, ll.3-25; Tr. at 43, ll.1-25; Tr. at 44, ll.1-8. Respondent loaned Banda an automobile, as well as a trailer in which to live. See Tr. at 49, ll.15-24. Camacho also approached Respondent for money, and Respondent acquiesced by giving him loans. See Tr. at 51, ll.22-25; Tr. at 52, ll.1-4.

Respondent solicited Banda's assistance in distributing the counterfeit I-94 forms and informed Banda that he wanted $200 for each counterfeit document. See CX-D-3. In early 1992, Dominguez provided the first counterfeit documents to Banda. See CX-D-3 (Banda states that the first time Dominguez provided him with a document to sell was "about a year and a half ago," which would be measured from the time of Banda's statement, which was made in September 1993). Banda paid Dominguez $200 for every immigration document he received.[14] Tr. at 85, ll.14-21; Tr. at 87, ll.5-7; Tr. at 90, ll.7-12; CX-D-4. Respondent never gave Banda any immigration document for free, and he never gave Banda any immigration document in exchange for information on criminal activity. Tr. at 90, ll.13-19; Tr. at 91, ll.2-6. Banda then sold the documents for $400. Tr. at 87, ll.5-13. Banda and Dominguez sold about an average of ten counterfeit documents each month. CX-D-4. Among the individuals to whom Banda sold a counterfeit document was Jorge Lopez-Hernandez, CX-C-1-2, who was apprehended on September 23, 1993, with the counterfeit I-94 form provided by Banda, CX-A-1.

It was Respondent's idea to sell I-94s to Banda, and Banda would sell them to people who were in the United States illegally. Tr. at 83, ll.23-25; Tr. at 84, ll. 1-3. When Banda wanted to order I-94 forms, he would call Respondent at work, at his home, or on his beeper. Tr. at 89, ll.5-8. The prospective purchasers would provide the money and the photographs to the CI, who would serve as a conduit to Respondent, and then Respondent would provide the I-94s when they were ready. See Tr. at 84, ll.7-23 (Banda's testimony); see also Tr. at 89, ll.17-25 (Banda); Tr. at 90, ll.1-6 (Banda); CX-VV-243-44 (Dominguez' deposition testimony stating that the informants would give him biographical information, consisting of names and birth dates, for the people who were to

[14] I specifically reject RPFF 7 and RPFF 9, which respectively request that I find that Respondent obtained less than $10,000 by selling false I-94 documents through Banda and that Respondent was partially motivated to engage in counterfeiting because of his concern for Banda and Camacho's economic privation.

receive documents for the first time); CX-TT-1 (Agent Jones' Request for Monetary Fine memorandum in which he summarizes that the vendors collected biographical information and two photographs from the people buying the documents). Respondent would call Banda when the documents were ready and meet with him to deliver the documents. Tr. at 89, ll.23-25; Tr. at 90, ll.1-6. Dominguez would keep a record of the information by photocopying the documents he prepared, although he did not necessarily photocopy every single document he created. See CX-VV-227-28, 234-35.

If there was a mistake on the document, Banda would give it back to Respondent to fix it. Tr. at 94, ll. 20-25. Respondent then would fix it and give it back to Banda. Tr. at 95, ll.1-2. Banda provided the purchasers of the I-94 documents with Respondent's instructions not to cross through Laredo, but to cross the border elsewhere to reduce the risk of detection. Tr. at 87, ll.20-25; Tr. at 88, ll.1-6. Dominguez continued to provide fraudulent documents up until his arrest. See Tr. at 32 (relating to documents provided to Camacho); Tr. at 95, ll.9-15 (relating to documents provided to Banda).

Banda never was prosecuted by the government, either criminally or civilly, for his part in the illegal counterfeiting operation. The U.S. Attorney's Office, however, did not grant Banda immunity. See Tr. at 158, ll.3-11. However, Banda has been paroled into the United States, see Tr. at 121, ll.5-16 (Banda testified that the INS voluntarily gave him an I-94 form, and that, at the time of the hearing, he still was in the United States pursuant to an I-94 form issued by the INS in connection with his testimony against Respondent); Tr. at 332, ll.8-20 (Agent Jones' testimony that Banda has been paroled into the United States in connection with this case, but not by the INS' San Antonio office). Banda has been paid $3,000. See Tr. at 120, ll.13-25. Banda has not been paid by INS since 1994, except to reimburse his expenses for appearing at the January 1998 hearing. See Tr. at 301, ll.2-25; Tr. at 302, ll.1-11 (testimony of Agent Jones).

Dominguez was arrested September 23, 1993, after delivering three counterfeit I-94 forms to Banda; after his meeting with the INS, Banda had agreed to cooperate with the INS and to make a controlled purchase of such forms from Dominguez. CX-A-1; CX-G-4-6. After he was arrested, Respondent telephoned his wife at their residence and, when he was unable to reach her there, he left a message on the telephone answering machine informing her that he was in the county jail, that the authorities were trying to get a search warrant to search the house, and instructing her when she got home to "burn up everything in [his] closet." CX-UU-1; see also Tr. at 37, ll.8-25; Tr. at 38, ll.1-25. Dominguez testified that, if it had not been for his bad memory, he would have destroyed all the evidence. See Tr. at 492, l.25; Tr. at 493, ll.1-6.

A search warrant was executed at Respondent's house, 406 Plymouth, Laredo, Webb County, Texas, in the early morning hours of September 24, 1993. See CX-H-1-2; Tr. at 174, ll.11-25. Agent Villarreal was present when the search took place. See Tr. at 174, ll.11-25; Tr. at 175, ll.1-7. Agents found in a bedroom closet a locked filing cabinet that contained an array of stamps, unused

permits, a number of blank and counterfeit I-94 forms,[15] as well as blank and completed social security cards, passports, alien resident cards, various types of identification cards, birth registration forms, baptismal certificates, all kinds of instructions, maps, equipment, ink pads, and seals and stamps to make I-94 forms. See Tr. at 175, ll.10-25; Tr. at 176, ll.1-12; CX-H-1-18 (reamended search warrant return). There were also I-94 forms seized at Respondent's house that were ready for mailing. See CX-QQ-53.

During the search the agents found instructions on a master, like a mimeograph, in Spanish that told aliens, in the event they were arrested by INS officials, to say they were witnesses in San Antonio or Dallas and were traveling, and to destroy these instructions after learning them. Tr. at 176, ll.18-25; Tr. at 177, ll.2-3. Agent Villarreal also found in the filing cabinet or closet a stack of hundreds of social security cards that he and another agent had seized in another case. Tr. at 179, ll.12-18. There was a filing system of some sort, with copies of executed I-94 forms kept together in an organized fashion; some of the permits had notes with instructions written on them. See Tr. at 177, ll.7-20.

Agent Villarreal was employed by the United States Border Patrol in Laredo for twenty-three years, including nine years as a Border Patrol agent and three years as an intelligence officer. Tr. at 162, ll.18-22; Tr. at 163, ll.8-18. In his capacity as intelligence officer, he was required to collect information and fraudulent documents, and he received special training and experience in recognizing counterfeit documents, including I-94s. Tr. at 163, ll.19-25; Tr. at 164, ll.1-25; Tr. at 165, ll.1-16. The I-94s Respondent made were of good quality and very professionally made. Tr. at 184, ll.18-25; Tr. at 185, ll.1-8 (testimony of Agent Villarreal). Someone who did not work for INS would not be able to produce a document of that quality. Tr. at 186, ll.12-19 (testimony of Agent Villarreal). Someone without extensive experience would not be able to detect these I-94s as fraudulent. Tr. at 187, ll.3-8 (testimony of Agent Villarreal).

The counterfeiting at issue in this case involved the counterfeiting of I-94 forms. See Compl. ¶ I.A; CX-I-1-206 (photocopies of the documents at issue in this case). The ultimate recipients of the counterfeit I-94 forms that were distributed all were illegal aliens. Tr. at 271, ll.1-4 (testimony of Agent Jones). If the I-94 form is stamped "Employment Authorized," it enables the document's owner to work in the United States, and satisfies the I-9 form[16] requirements for

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[15] Respondent had purchased approximately 3,000 I-94 forms from the Government Printing Office, and approximately 1,000 blank documents were discovered during the search of his residence. Tr. at 290, ll.15-25; Tr. at 291, l.1 (testimony of Agent Jones). However, there is no evidence that Respondent issued 2,000 false or counterfeit I-94 forms. Tr. at 310, ll.15-25; Tr. at 311, ll.1-23 (Jones).

[16] The INS employment eligibility verification form, or I-9 form, must be completed for each individual starting work at a new employer; as part of the I-9 requirements, the individual must present documents, from a list of permissible documents, that verify the individual's

(continued...)

employment. Tr. at 200, ll.20-24; Tr. at 201, ll.4-7 (testimony of Agent Villarreal). A completed I-94 form allows an alien to enter the United States and to derive other benefits, such as social security benefits and welfare benefits. Tr. at 269, ll.23-25; Tr. at 270, ll.1-4 (testimony of Agent Jones). Illegal aliens can use an I-94 form stamped as employment authorized to obtain employment in the United States, thus obtaining jobs that otherwise would go to United States citizens and resident aliens. Such a result defeats one of the purposes of the INS and the immigration laws, which is to prevent people from entering the country illegally and obtaining illegal employment. Tr. at 270, ll.4-13 (testimony of Agent Jones); see also 8 U.S.C. § 1324a(a), (b)(1) (1994). Almost all of the I-94 forms listed in the Complaint were designated for employment authorization; almost all of them also were marked to permit multiple entries into the United States. See CX-I-1-206. A "multiple entry" stamped I-94 would be very valuable because it is common for aliens, even if they live in areas north of the border, like San Antonio, to return to Mexico periodically to visit their relatives. Tr. at 244, ll.4-22.

After Respondent's arrest, a team of investigators from the Office of the Inspector General (OIG) and INS thoroughly investigated the Laredo ASU and its informants. The investigation into the counterfeiting operation had a devastating impact on law enforcement by the ASU at Laredo. See generally Tr. at 187-89 (testimony of Agent Villarreal); Tr. at 375-76 (testimony of now retired INS Assistant District Director for Investigations Gary Renick). Once Respondent was arrested, the ASU came under scrutiny as possibly involved in the fraud; every informant who came through the bridge was grabbed and interrogated to insure that no one from ASU had sold him a permit or that his permit was issued wrongfully. Tr. at 187, ll.9-16. This devastated the informant crop because no one wanted to work for ASU because they did not want to go through the hassle of a thorough interrogation. See Tr. at 187, ll.17-21. It is very difficult for the ASU to work without CIs because it is the Cis who get close to the people who engage in illegal activity. See Tr. at 187, ll.22-25; Tr. at 188, ll.1-4. The law enforcement efforts of the ASU were diminished to almost nothing for six months to a year because of the impact of the informant problem, and because Washington sent a team to Laredo to investigate Respondent, but Agent Villarreal said he believed the team was investigating all the other ASU agents too; nothing was going on in the office, besides the investigation, for nearly a year. See Tr. at 188, ll.12-19; Tr. at 189, l.1. The entire Laredo ASU was under a "shadow or . . . cloud of doubt" as an operational entity because some of their operational procedures, and those of other agencies, were disclosed. See Tr. at 376, ll.10-16 (testimony of Mr. Renick regarding what he learned through ASU agents in Laredo).

Banda was a good and valuable informant up until the time of the arrest; he provided good information to Agent Villarreal, such that the INS was able to make cases on almost every operation about which he gave information. See Tr. at 196, ll.15-25; Tr. at 197, ll.1-5. Since Respondent's arrest, Banda has not been able to provide information; Agent Villarreal finds it difficult to work with Banda because of what happened. See Tr. at 197, ll.6-13.

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[16](...continued)
identity and authorization to work in the United States. See 8 U.S.C. § 1324a(b)(1) (1994); 8 C.F.R. § 274a.2(a), (b) (1997).

On October 19, 1993, a three count indictment was entered against Dominguez charging him with three violations of 18 U.S.C. § 1546(a), for knowingly uttering, offering to sell, selling and otherwise disposing of I-94 arrival and departure records.[17] CX-KK-1-2. On November 23, 1993, a superseding eleven count indictment was issued that charged Respondent with violations of 18 U.S.C. §§ 371, 506, 641, 1028(a)(4), and 1546(a), and 42 U.S.C. § 408(a)(7)(C). CX-LL-1-6. On December 16, 1993, pursuant to a plea arrangement between Dominguez and the United States Department of Justice, he pled guilty to Count I of the superseding indictment, which charged conspiracy to violate 18 U.S.C. § 1546(a), that is to knowingly utter, use, possess, obtain, accept, or receive I-94 arrival and departure records knowing such records to be forged, counterfeited, altered, or falsely made, CX-MM-1-2, and the government dropped the other ten counts and agreed to recommend a sentence at level 13 of the United States Sentencing Commission's Guidelines Manual (U.S.S.G.), see CX-MM-3; see also CX-NN-9. The plea arrangement also provided that, if Dominguez provided substantial cooperation in the government's continuing investigation, based on the government's evaluation of Respondent's cooperation, the government might file a separate motion recommending a lower level for sentencing. CX-MM-3-4; see also CX-NN-10.

After Respondent and the government agreed to a plea bargain on the criminal case, Dominguez cooperated with the OIG investigation. See Tr. at 34, ll.9-25; Tr. at 35, ll.1-6; Tr. at 36, ll.3-25; Tr. at 37, ll.1-6 (Respondent's testimony regarding the time frame in which his cooperation began); Tr. at 453, ll.1-12 (Respondent's testimony that he participated in approximately four interviews and submitted to more than three polygraph examinations); see also Tr. at 455, ll.4-25; Tr. at 456, ll.1-21. Agent Jones agreed that Respondent gave substantial quantities of information regarding his involvement in this case. Tr. at 326, ll.19-21.

The sentence authorized by statute for the offense charged in Count I of the indictment provided for a period of imprisonment of not more than five years and/or a fine of not more than $250,000, a $50 special assessment, and a term of supervised release of not more than three years. See CX-MM-2. A presentence investigation report was prepared for the U.S. District Court by a Senior United States Probation Officer on March 31, 1994; the report was approved by the supervising U.S. Probation Officer on June 23, 1994, and an addendum to the presentence report was approved on June 24, 1994. See RX-D-1-21. The U.S.S.G., based on offense level 13, provided for a range of 12 to 18 months imprisonment and a fine range of $3,000 to $30,000. CX-OO-6. After a sentencing hearing on August 5, 1994, before the U.S. District Court, see CX-PP-1-44, the District Judge sentenced Dominguez to a term of fifteen months imprisonment, with three years of supervised release, and assessed a fine of $15,000, CX-OO-2-4; see also CX-VV-80. Dominguez paid the criminal fine, CX-VV-80, and a satisfaction of judgment was entered on May 8, 1996, RX-I-1.

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[17] As discussed above, a completed I-94 form allows an alien to enter the United States and to derive other benefits, such as social security benefits and welfare benefits, Tr. at 269, ll.23-25; Tr. at 270, ll.1-4, and can enable the document's owner to work in the United States, if the I-94 form is stamped "Employment Authorized," Tr. at 200, ll.20-24; Tr. at 201, ll.4-7.

Agent Jones personally served Dominguez with a Notice of Intent to Fine on June 7, 1995. See NIF at 2 (attached as Exhibit A to the Complaint). Some of the counterfeit documents that were seized at Respondent's residence were not included in the present Complaint because they were created prior to the effective date of section 274C.[18] See Tr. at 318, ll.1-6; Tr. at 337, ll.8-15. Agent Jones served as the case agent in the civil case against Respondent. In recommending the proposed civil money penalty, Agent Jones did not consider any mitigating factors and did not consider that a criminal fine had been assessed and paid. Tr. at 325, ll.6-24. He considered as strong aggravating factors the facts that Respondent was an immigration officer, that he knew how immigration documents were made, that he used this knowledge of how to manufacture those documents to assist the scheme, that he used his training, which other counterfeiters do not have, that he used INS informants to perpetrate the scheme, and that it was all done for money. See Tr. at 271, ll.10-22. In approving Agent Jones' proposed penalty amount, then-Assistant District Director for Investigations Renick believed two factors were particularly important: the seriousness of the offense and the other aggravating factors. Tr. at 366, ll.7-13. The other aggravating factors included Respondent's use of INS informants to sell the documents, and that these documents could have been sold to criminals, narcotics traffickers, other organized crime organizations, and possibly even terrorists, because disreputable characters are the types of people with whom informants associate. See Tr. at 367, ll.7-12. The purpose of the civil money penalty proceeding in this case is to punish Mr. Dominguez, see Tr. at 396, ll.4-8 (testimony of Mr. Renick), and to deter others who might consider engaging in similar conduct, see Tr. at 323, ll.3-13 (testimony of Agent Jones).

Dominguez is a college graduate with a degree in education, specializing in Spanish. Tr. at 407, ll.1-8. With respect to his ability to pay, although he has a teaching degree or certificate, Tr. at 469, ll.3-10, he has no teaching experience in the public or private schools,[19] Tr. at 508, ll.6-18, and it is unlikely that he could secure such employment given his felony conviction, see Tr. at 412, ll.13-22. Moreover, although he has the background and experience to work as an armed security guard or auxiliary policeman, see Tr. at 412, ll.8-12, it is highly unlikely, given his criminal record, that he could obtain a permit to carry a gun or could obtain employment as a security guard, see Tr. at 412, ll.23-25; Tr. at 413, ll.1-12.

Dominguez currently is receiving medical treatment for depression and anxiety, see Tr. at 413, ll.13-24, ulcers, see Tr. at 414, ll.1-18, high blood pressure, see Tr. at 414, ll.19-25; Tr. at 415, ll.1-6, and enlargement of the prostate gland, see Tr. at 415, ll.13-18, and he also experiences certain back and neck problems, see Tr. at 415, ll.21-25; Tr. at 416, ll.1-25. However, Respondent has experienced those conditions, except maybe the prostate condition, since before the

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[18] The INA's document fraud causes of action were added by the Immigration Act of 1990.

[19] Dominguez did teach at the Border Patrol Academy for three sessions in 1970 and 1971. Tr. at 508, ll.6-11.

time he was arrested. See Tr. at 474, ll.2-17. Respondent has had no major change in his health since the time of his arrest. See Tr. at 474, ll.12-22. Dominguez felt fine at the time of the hearing, see Tr. at 475, l.13.

Respondent was married to Bertha Dominguez from 1965, Tr. at 408, ll.18-25, until March 10, 1997, when they were divorced, RX-SS-11.[20] Bertha Dominguez filed for divorce, Tr. at 418, ll.7-9, in December 1996, Tr. at 483, ll.10-13, shortly before discovery in the present case closed on December 31, 1996, see Order Governing Prehearing Procedures at 2 (Aug. 12, 1996). The divorce was uncontested. Tr. at 483, ll.14-17. The divorce decree did not provide for any support payments, but did divide the property between Respondent and his former wife. See RX-SS-2-10. Respondent and his former wife had agreed on how to divide the property. See Tr. at 484, ll.1-4. As part of the decree, Bertha Dominguez was divested of all rights and interest in certain real estate, stocks, bonds, securities and other property described in the divorce decree, RX-SS-4-7, and, similarly, Respondent was divested of rights in other such property, RX-SS-2-4. The divorce decree also provided for Bertha Dominguez to receive a portion of Respondent's federal retirement benefits, see RX-SS-4, and she receives forty percent of his $3,000 monthly retirement annuity, Tr. at 420, ll.1-19. Respondent receives $1,853 per month as his share of the pension. Tr. at 452, ll.2-4. Dominguez knew that Complainant was seeking a fine in excess of $400,000 against him before the divorce took place. Tr. at 484, ll.5-17.

Dominguez' presentence report, prepared March 31, 1994, with respect to his criminal prosecution, see RX-D-1, lists seventeen pieces of real property, see RX-D-12. Dominguez said he provided the information regarding the real property and other assets to the probation officer prior to his criminal sentencing, Tr. at 479, ll.16-21, but then he said that his former wife provided it, Tr. at 480, ll.1-2. At the time of the hearing in January 1998, Dominguez only owned two of those properties. See Tr. at 480, ll.6-20. Between 1994 and the time of trial, Respondent had disposed of fifteen pieces of real property. Tr. at 480, ll.21-25.

Respondent subsequently sold three of the parcels he received in the divorce. Pursuant to the divorce decree, he received the property located at 414 S. Crisp, Lot 6 Block 6 Colonia Alameda, see RX-SS-6; Tr. at 427, ll.3-6, and sold it on April 21, 1997, for $26,000, see RX-TT-1. He received the property located at 415 S. Crisp, Lot 11 Block 5 Colonia Alameda, see RX-SS-6, sold it on September 16, 1997, see RX-UU-1, and received $24,000 in proceeds, see Tr. at 436, ll.1-4. Respondent received the property located at 210 E. White in Dilley, Texas, see RX-SS-6, and subsequently sold it, see Tr. at 436, l.25; Tr. at 437, ll.1-4 (the record does not reveal when or for how much Respondent sold this particular property). Respondent kept a property in Dilley, Texas, that he received in the divorce, see RX-SS-5-6; Tr. at 426, ll.3-14, 23-24, that he estimates is worth

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[20] Respondent says he and his former spouse were divorced on February 6, 1997, Tr. at 409, ll.2-3, and that the divorce decree was issued on that date, Tr. at 418, ll.5-6. The divorce case was heard in a Texas state district court on February 6, 1997, CX-SS-1, but the presiding judge did not sign the Final Decree of Divorce until March 10, 1997, RX-SS-11. The designation "Date of Judgment" appears immediately above the March 10 date. RX-SS-11.

$6,000, Tr. at 426, ll.19-22. At the time of the hearing, Respondent also still owned a property located in Zapata, Texas, that he received in the divorce, see RX-SS-5; Tr. at 420, ll.20-25; Tr. at 421, ll.1-6; Respondent said the tax appraisal of that property is a little more than $800, but that its true market value could be $1,000, see Tr. at 421, ll.7-15. Respondent also still owns the property at 24183 Boerne Stage Road. See RX-SS-5; Tr. at 437, ll.15-23. Bertha Dominguez took seven pieces of real property in the divorce, see RX-SS-2-3, exclusive of her separate property, see RX-SS-9-10. Respondent has not offered in evidence his 1996 tax returns or any other more recent financial statement.[21]

Respondent has four children, all of whom are more than eighteen years of age.[22] Tr. at 467, ll.21-25; Tr. at 468, ll.1-2. The children live at the same property where Respondent resides at Boerne Stage Road. See Tr. at 410, ll.5-12; Tr. at 470, ll.1-2, 9-11. The two youngest daughters are students at the University of Texas in San Antonio. Tr. at 409, ll.14-16. Respondent pays for their college tuition and books. Tr. at 410, ll.3-4. Bertha Dominguez does not contribute to the college costs of their daughters. Tr . at 508, ll.2-5. Respondent's oldest daughter is married, Tr. at 470, ll.3-5, and is in business, see Tr. at 410, ll.20-22; her husband is employed full time, Tr. at 470, ll.3-8. Respondent supports his adult children by paying some of their expenses, such as utilities, college expenses and car insurance, see Tr. at 447, ll.18-25; Tr. at 448, ll.1-23; Tr. at 449, ll. 5-14, 24-25; Tr. at 450, ll.1-4; Tr. at 451, ll.2-7, 13-16, as well as by providing their housing.

Respondent works at Winfield's Restaurant and Motel. See Tr. at 411, ll.7-10; Tr. at 417, ll.12-13. Respondent's boss at Winfield's is his former wife, Bertha Dominguez. Tr. at 417, ll.14-17. Bertha Dominguez runs the restaurant. Tr. at 494, ll.9-11. Employment is a requirement of Respondent's parole, and he will remain on parole until October 21 of this year. See Tr. at 411, ll.15-20.

Respondent says that he is a supervisor at Winfield's. Tr. at 411, ll.9-12; see also Tr. at 494, ll.2-5. He also says that he is not a partner with his former wife in running the restaurant and motel. Tr. at 505, ll.23-25. Respondent, however, has referred to the restaurant and motel as his own business. See Tr. at 515, ll.16-22 (testimony of Agent Hall that Respondent used the terms "I" and "my" when referring to the restaurant and motel). On December 5, 1997, Special Agent Roy Hall and Border Patrol Agent Rolando Salinas stopped at Winfield's restaurant for coffee. See Tr. at 513, ll.2-25; Tr. at 514, ll.1-17. As the agents were finishing eating, Respondent came over to their table; he apparently knew Agent Salinas. See Tr. at 515, ll.1-9. Respondent told the agents that business had really picked up at the restaurant, that the restaurant had developed loyal customers, and that people drove from around town to eat there. See Tr. at 515, ll.23-25; Tr. at 516, ll.1-4 (testimony

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[21] As will be discussed in more detail later, see infra part V, I reject RPFF 12 and RPFF 13, which assert that Respondent is only able to pay up to $500 per month, or $18,000 total, in satisfaction of a fine assessed in this matter.

[22] Dominguez's eldest daughter is thirty-one years old, his son is twenty-five years old, and his two youngest daughters are twenty-three and twenty years old. Tr. at 409, ll.11-13.

of Agent Hall). He also told the agents that the motel was full every night. Tr. at 516, ll.5-9 (testimony of Agent Hall). It appeared to Agent Hall that Respondent gave directions to employees. See Tr. at 517, ll.18-20. Respondent told the agents that he wanted to open a place up north, but that his wife had family south of San Antonio, his children had their friends there, and that no one wanted to move up north, so he decided he would look around San Antonio for a location to open another restaurant. See Tr. at 516, ll.10-20.

Respondent has admitted having this conversation with Agents Hall and Salinas in December 1997. See Tr. at 506, ll.16-18. He admitted telling the agents that he would like to move out of Texas to open a restaurant up north, if he could take his wife and children with him, but that was his personal opinion, if he had things his way. See Tr. at 498, ll.14-23. Respondent said he is not planning to open a restaurant. See Tr. at 499, ll.3-8.

There is no credible evidence that Respondent ever threatened Banda or his family, any federal agent, or any other individual who cooperated in the government's case against Respondent. See infra part IV.B.4.e. Indeed, the evidence suggests that Respondent has remained on friendly terms with at least some INS agents. See Tr. at 506, ll.19-25; Tr. at 507, ll.1-4; Tr. at 515, ll.1-15. I specifically reject CPFF 19, which states that associates of Respondent threatened Banda after Respondent's arrest.

IV. DISCUSSION

A. Liability Issues

1. Possess

I previously have ruled in this case that, as a matter of statutory construction, possession of a counterfeit document merely incident to its creation does not satisfy the section 1324c(a)(2) possession violation. See PHC(2) Tr. at 32, 51; SD Order at 3; FPO at 4, ¶ 5.A.3. Complainant argues that Respondent should be found to have possessed all ninety-seven counterfeit documents because, among other reasons, he had possession of them pursuant to the manufacturing process. See Cbr. 31. If Complainant's argument were accepted, then every time a document was counterfeited, there would be violations of both 1324c(a)(1) and 1324c(a)(2). Complainant cites nothing in the statute or the legislative history that indicates Congress intended such a result. In almost all OCAHO cases, the same documents have not been charged as separate counts for both counterfeiting and possession.[23]

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[23] In fact, I have found only two OCAHO cases in which the INS charged any section 1324c(a)(1) violation along with any section 1324c(a)(2) violation regarding the same document. Both of these cases involved the same INS counsel who appeared in this case. In United States v. Makilan, 4 OCAHO 202 (Ref. No. 610) (1994), 1994 WL 269385 (Thomson), the INS charged that the respondent "knowingly forged, counterfeited, altered, and falsely made an

(continued...)

Although I have based my decision on an interpretation of the statute, Complainant's position also carries constitutional implications. Respondent argues that imposing fines for the allegations of both Counts I and II would amount to an unconstitutional double punishment for the same actions, in violation of the Fifth Amendment's double jeopardy clause. See Ans. ¶ 11; Rbr. 5 (RPCL 1). The double jeopardy clause[24] protects against three events: (1) a second prosecution for the same offense after conviction; (2) a second prosecution for the same offense after acquittal; and (3) multiple punishments for the same offense. See Grady v. Corbin, 495 U.S. 508, 516 (1990), overruled on other grounds by United States v. Dixon, 509 U.S. 688 (1993); North Carolina v. Pearce, 395 U.S. 711, 717 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794 (1989). It is the last of those three events that Respondent's argument implicates. Complainant's own evidence shows that punishment is at issue in this case. See Tr. at 396, ll.4-8 (testimony of Mr. Renick); Tr. at 323, ll.3-13 (testimony of Agent Jones).[25]

The Supreme Court has formulated a test, recited in Blockburger v. United States, 284 U.S. 299 (1932), by which to decide whether the "same offense" is involved. "The Blockburger test was developed 'in the context of multiple punishments imposed in a single prosecution.'" Grady,

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[23](...continued)
Application to file Petition for Naturalization, Form N-400, and Biographic Information, Form G-325," in violation of section 1324c(a)(1), and that the respondent knowingly used the same documents, in violation of section 1324c(a)(2). The case eventually settled. In United States v. Salazar, OCAHO Case No. 97C00099 (Jan. 28, 1998), 1998 WL 63440 (Lewandowski), one of my own prior cases, the INS charged that the respondent forged, counterfeited, altered, and falsely made an I-94 form, in violation of section 1324c(a)(1), and that the respondent possessed or provided the same I-94 document, in violation of section 1324c(a)(2). In that case, I entered judgment for the complainant based on the respondent's abandonment of his request for hearing. Therefore, the issue of whether counterfeiting a document in violation of section 1324c(a)(1) also necessarily constitutes a violation of section 1324c(a)(2) was not raised or was not adjudicated in either case.

[24] "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V.

[25] Although earlier in this proceeding I rejected Respondent's affirmative defense based on double jeopardy, that only addressed the first prong, which was a subsequent prosecution after a conviction, namely a civil proceeding after he was criminally prosecuted and punished. I did not adjudicate any issue as to multiple, as opposed to subsequent, punishment. Indeed, the Blockburger issue has been specifically preserved as an issue in the Final Prehearing Order, see FPO at 3, ¶ 4.C, namely "[w]hether the double punishment for possession of forged, counterfeited or falsely made documents in addition to imposition of penalties for the forgery, counterfeiting or false making thereof violates the double jeopardy provisions of the 5th Amendment to the United States [C]onstitution."

495 U.S. at 516 (quoting Garrett v. United States, 471 U.S. 773, 778 (1985)). The Blockburger issue is very closely related to that of statutory construction. See Grady, 495 U.S. at 516-17 (stating that, in the context of multiple punishments imposed in a single prosecution, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended," and referring to the Blockburger test as a "rule of statutory construction") (quoting Missouri v. Hunter, 459 U.S. 359, 366 (1983)).

"In accord with principles rooted in common law and constitutional jurisprudence, [the Supreme Court] presume[s] that 'where two statutory provisions proscribe the "same offense,"' a legislature does not intend to impose two punishments for that offense." Rutledge v. United States, 517 U.S. 292, 297 (1996) (citations omitted). Under Blockburger, when the same act or transaction would violate two distinct statutory provisions, "the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not." Rutledge, 517 U.S. at 297 (quoting Blockburger, 284 U.S. at 304).

If I were to adopt Complainant's contention in this case, there would be no additional proof required to impose punishment for a section 1324c(a)(2) violation beyond that necessary to prove a violation of section 1324c(a)(1). The present situation is very close to that in Ball v. United States, 470 U.S. 856 (1985). In Ball, the Supreme Court ruled that, although the government could prosecute an individual for both receiving and possessing the same weapon, see Ball, 470 U.S. at 859, it could not obtain convictions for both offenses because, applying Blockburger, "proof of illegal receipt of a firearm necessarily includes proof of illegal possession of that weapon," id. at 862. In Dominguez' case, proof of creating the counterfeit documents necessarily includes proof of his possession of those documents. Therefore, I may not impose an additional punishment on Dominguez for possessing counterfeit documents that I already have found he counterfeited, at least when the possession was merely incidental to the counterfeiting.[26] I conclude, as I have held previously in this case, that a person does not violate section 1324c(a)(2) merely by the act of counterfeiting.

Complainant also contends that Respondent had possession of the counterfeit I-94 forms by having dominion, custody and control over them when he made preparations to distribute them, by placing them in packages for mailing to his intermediaries, or when he photocopied them for his record keeping system. See Cbr. 31-32 (citing CX-VV-352, ll.6-22; CX-A-14). Complainant argues that Respondent's possession of the documents in preparation for distribution constitutes a discrete act separate from manufacturing. Cbr. 32. That may be a valid point, but the question remains whether Complainant has shown that Respondent had such custody and control of specific

[26] Adopting Complainant's argument would violate a fundamental rule of statutory construction; namely, if a statute is subject to more than one interpretation, one of which would be in conflict with the Constitution, the statute should be read in a manner that does not create the constitutional infirmity. See Feltner v. Columbia Pictures Television, Inc., 118 S. Ct. 1279, 1283 (1998); United States v. Haines, 855 F.2d 199, 201 (5th Cir. 1988).

documents charged in the Complaint.[27] If Complainant has produced such evidence so as to maintain its burden of proof, then a finding of liability would be warranted. However, Complainant was given the opportunity during trial to elicit such evidence and made no effort to do so. Complainant acknowledges that it did not produce evidence on this point at trial. See Tr. at 533, ll.18-25; Tr. at 534, ll.1-5.

The record evidence outside of the hearing transcript also does not aid Complainant's position. Complainant cites CX-VV-352, lines six through twenty-two, and CX-A-14 for its assertion that Respondent possessed the I-94 forms when he made preparations to distribute them and when he photocopied them for his record keeping purposes. See Cbr. 31-32. Those cited passages reveal that Respondent photocopied I-94 forms that he created, but they do not link specific documents to the photocopying.[28] Although Complainant's theory may be valid, it has failed to produce proof that Respondent possessed, in a manner not incidental to manufacture, any of the specific I-94 forms listed in the currently unadjudicated paragraphs of Count II.

Respondent could be considered to have "possessed" documents that his intermediaries returned to him for corrections or renewals, however, Complainant does not so contend in its brief, and, in any event, the record does not reveal which specific documents fit that category. Among the documents referenced in currently unadjudicated paragraphs of Count II, the record reveals that the I-94 forms referenced in paragraphs 22, 23, 92, 101 and 102 were either returned to Respondent or not mailed. See Addendum to SD Order at 29, 30, 38, 39 (referring to paragraphs 22, 23, 92, 101 and 102, and citing CX-QQ-53). The record, therefore, does not show by a preponderance of the

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[27] With respect to the 54 I-94 documents Complainant has shown that Respondent subsequently provided to the informants/intermediaries, possession would be inherent. However, Complainant is not seeking any additional penalty for those documents Respondent may have possessed as well as provided, and, thus, no Blockburger double jeopardy issue is implicated. Therefore, I confine my examination of which documents might have been possessed to the currently unadjudicated paragraphs of Count II because a ruling as to possession for any other documents is unnecessary. I also leave open the question whether Congress intended in section 1324c(a)(2) to establish as a violation possession that is incident to providing a document for which another 1324c(a)(2) violation already has been found; as a result, I make no finding regarding whether Complainant has demonstrated possession of the 54 provided documents distinct from the act of providing.

[28] In his November 1996 deposition, Respondent agreed that his practice was to photocopy each document he made, see CX-VV-352, ll.17-19, and the INS Report of Investigation recounts that Respondent said during a January 1994 debriefing that he photocopied approximately 90 percent of the counterfeit documents he made, see CX-A-14. Also, I previously have found, see supra part III.B, that Dominguez would keep records by photocopying the documents he prepared, although he did not necessarily photocopy every single document he created. See CX-VV-227-28, 234-35.

evidence that those documents were returned to Respondent, and, thus within his possession independent of his creation of them. Thus, Complainant has failed to prove that Respondent had dominion, custody and control of any of the counterfeit I-94 forms, other than the fifty-four documents that he provided to his informants/intermediaries.

2. Use/attempt to use

Complainant requests no fact finding and no conclusion of law with respect to the issue of whether Respondent used or attempted to use the I-94 forms listed in Count II of the Complaint. I previously entered judgment for Respondent as to Count II with respect to the allegation that Respondent used or attempted to use the I-94 documents, see FPO at 5, ¶ 5.A.12; FPO at 6, ¶ 5.A.29; PHC(3) Tr. at 24-25, and Complainant did not seek interlocutory review of that ruling.

3. Ruling

I have ruled on liability with respect to all 103 paragraphs of Count I prior to this Decision and Order. For the sake of convenience, the following constitutes a consolidated summary of the liability rulings in this case. With respect to Count I, Respondent counterfeited and falsely made the documents referenced in paragraphs 1-23, 25-51, 53-59, 61-74, 76-87 and 90-103. FPO at 4, ¶ 5.A.6; FPO at 7, ¶ 5.B.1. Respondent also forged the six documents referenced in paragraphs 2, 3, 25, 26, 27 and 28. FPO at 4, ¶ 5.A.7. Judgment is entered for Respondent with respect to paragraphs 24, 52, 60, 75, 88 and 89 of Count I. PHC(3) Tr. at 24. Respondent did not "alter" any of the I-94 forms referenced in Count I, as that term is used in section 1324c(a)(1).

With respect to Count II, Respondent provided the counterfeited, falsely made, and/or forged documents referenced in paragraphs 2, 3, 8, 12-13, 18-19, 25-37, 43-49, 53-59, 64-67, 70-72, 76-77, 80, 83, 87, 90, 93-95, 98-100, and 103. SD Order at 22; PHC(3) Tr. at 25. Of the 103 paragraphs of Count II, forty-nine of them remained unadjudicated until now. I find in favor of Respondent with respect to Count II, paragraphs 24, 52, 60, 75, 88 and 89 on the ground that Complainant failed to demonstrate that the I-94 forms referenced in those paragraphs were forged, counterfeited, altered, or falsely made.[29] I also find for Respondent with respect to Count II, paragraphs 1, 4-7, 9-11, 14-17, 20-23, 38-42, 50, 51, 61-63, 68, 69, 73, 74, 78, 79, 81, 82, 84-86, 91, 92, 96, 97, 101 and 102, on the ground that Complainant has not demonstrated by a preponderance of the evidence that Respondent possessed any of those individual documents in a manner contemplated by section

[29] At the final prehearing conference, I ruled in Respondent's favor with respect to those six documents in relation to Count I, see PHC(3) Tr. at 24-25, but I did not until now enter judgment with respect to them in relation to Count II, which alleges that Respondent used, attempted to use, possessed, or provided forged, counterfeited, altered, or falsely made documents. Since the record evidence indicates that those six I-94 forms were legitimate, see Addendum to SD Order at 30, 33-35, 37 (referring to paragraphs 24, 52, 60, 75, 88, and 89, and citing CX-RR-83), then I also must enter judgment for Respondent with respect to those documents in Count II.

1324c(a)(2), i.e., in a manner distinct from the manufacture of those fraudulent documents. With respect to those documents in Count II, Complainant points to no evidence that shows Respondent possessed them within the meaning of section 1324c, so judgment is entered for Respondent regarding those documents. Judgment also is entered for Respondent with respect to the allegation that Respondent used or attempted to use the documents referenced in Count II. PHC(3) Tr. at 24-25.

B. Penalty Issues

1. Background

a. Applicable statutory provision

The version of section 1324c that existed prior to its 1996 amendment mandates a cease and desist order, as well as a civil money penalty in an amount "not less than $250 and not more than $2,000 for each document used, accepted, or created and each instance of use, acceptance, or creation," for a first-time violator. See 8 U.S.C. § 1324c(d)(3) (1994). That language also "requires the imposition of civil money penalties for 'possessing' or 'providing' documents in violation of § 1324c." United States v. Dominguez, 7 OCAHO 972, at 7 (1997) (CAHO Modification). Since the events giving rise to the present case, section 1324c has been amended to provide for a civil money penalty of "not less than $250 and not more than $2,000 for each document that is the subject of a [section 1324c(a)] violation." See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 212(c), 110 Stat. 3009 (Sept. 30, 1996) (codified at 8 U.S.C. § 1324c(d)(3) (Supp. II 1996)). Respondent contends "that the range of penalty is limited by the IIRIRA amendments to a single violation per document." Rbr. 9; see also PHC(1) Tr. at 57. I previously have ruled that the amendments to section 1324c generally were not intended to be retroactive, see SD Order at 2; PHC(2) Tr. at 38-42, and the CAHO has agreed, see Dominguez, 7 OCAHO 972, at 2, n.3 (CAHO Modification). Therefore, section 1324c(d)(3) as it existed prior to IIRIRA applies to this case.

b. Penalty considerations

Although the INA provides five factors that an Administrative Law Judge must consider when setting a civil money penalty for verification violations under section 1324a, see 8 U.S.C. § 1324a(e)(5) (1994), the statute provides no guidance regarding the factors that should be considered in setting an appropriate civil money penalty amount in document fraud cases. As Complainant accurately points out, see Cbr. 42, "[t]here are no statutory or regulatory criteria for assessment and adjudication of the civil money penalty for violating Section 274C" of the INA.

Complainant points to factors outlined in a 1992 memorandum from the INS Commissioner's Office (Commissioner's Memorandum),[30] see CX-XX, as providing guidance regarding how to set an appropriate civil money penalty, see Cbr. 42. The Commissioner's Memorandum instructs INS employees who propose an amount for a civil money penalty to consider the following factors: the respondent's age; the seriousness of the violation; the respondent's history of previous criminal/civil violations; the respondent's immigration status (274C violations may result in deportation proceedings); the purpose of the document fraud; and any other aggravating factors. See CX-XX-6-7.

The Commissioner's Memorandum, however, is not binding in this proceeding. As Respondent accurately points out, see Rbr. 7, n.2, the factors outlined in the Commissioner's Memorandum have not been promulgated in a regulation. Complainant also admits, both implicitly and expressly, that the Commissioner's Memorandum penalty factors do not have the force of a regulation. See Cbr. 42 (implicitly recognizing such when it states that "[t]here are no statutory or regulatory criteria for assessment and adjudication of the civil money penalty for violating Section 274C"); PHC(1) Tr. at 66 (expressly responding in the negative to the question "[h]ave the factors that are in the Commissioner's [M]emorandum ever been promulgated in a regulation?").

Additionally, no OCAHO Administrative Law Judges have held that the Commissioner's Memorandum penalty factors are binding. Complainant points to several OCAHO cases that have considered the Memorandum factors, see Cbr. 47, but none of those cases considered those factors exclusively, and none held that those factors are binding, see United States v. Villatoro-Guzman, 4 OCAHO 530, 539 (Ref. No. 652) (1994), 1994 WL 482550, at *7 (Frosburg, J.) ("In determining the appropriate amount of civil money penalties in a document fraud case under 8 U.S.C. § 1324c, I have decided that I will use a judgmental approach under a reasonableness standard and consider the factors set forth by Complainant [the same factors espoused in the Commissioner's Memorandum], any relevant mitigating factors provided by Respondent, and any other relevant information of record."); United States v. Diaz-Rosas, 4 OCAHO 985, 992 (Ref. No. 702) (1994), 1994 WL 752313, at *5 (Schneider, J.) (citing Villatoro-Guzman); United States v. Noriega-Perez, 6 OCAHO 859, at 13, 1996 WL 454997, at *11 (McGuire, J.) (citing Villatoro-Guzman and Diaz-Rosas), petition for review filed, No. 96-70513 (9th Cir. 1996).

Even in areas dealing with items other than the Commissioner's Memorandum, OCAHO ALJs consistently have held that non-published INS enforcement guidelines are not binding on the Court. In United States v. Fortune East Fashion, Inc., 7 OCAHO 992, at 3 (1998), Judge Thomas discusses an internal INS memorandum that addresses guidelines for proposing civil money penalties in employer sanctions cases (INS Guidelines) "in an effort to ascertain how the proposed penalties" were initially calculated by the INS. Judge Thomas states that, "[w]hile I am not bound by those Guidelines, I have consulted them in an effort to understand INS' rationale in order to better assess

[30] The Commissioner's Memorandum is addressed to certain INS officials, specifically, the Staff Assistant for Field Operations, District Directors, Chief Patrol Agents, Service Center Directors, and Officers in Charge. See CX-XX-1.

the reasonableness of its proposed penalties." Fortune East, 7 OCAHO 992, at 3. In United States v. Williams Produce, Inc., 5 OCAHO 54, 59 (Ref. No. 730), 1995 WL 265081, at *4, aff'd sub nom. Williams Produce, Inc. v. INS, 73 F.3d 1108 (11th Cir. 1995) (table), Judge Morse states that, "although not binding on this fact-finder, I also from time to time examine pertinent guidelines established by INS for determining the civil money penalty, the purpose of which is to promote consistency." In addition, in Dhillon v. The Regents of the University of California (University of California, Davis, Department of Human Anatomy), 3 OCAHO 977, 991 (Ref. No. 497) (1993), 1993 WL 404559, at *10, Judge Schneider states that the Court was not bound by an INS Operations Instruction (OI) because "[a]s an interpretive rule, the operations instruction is exempt from the notice and public comment requirements of the Administrative Procedure Act ('APA'). Unlike substantive rules, which 'effect a change in existing law or policy,' interpretive rules are 'rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" Id. (citations omitted).

The Commissioner's Memorandum, per se, really is not even relevant to this proceeding.[31] The Memorandum is an internal INS document that provides guidelines for its own employees and carries no binding weight. Cf. Haitian Refugee Center, Inc. v. Baker, 953 F.2d 1498, 1511 (11th Cir.) (INS Guidelines for Interdiction at Sea "create no substantive rights that can be judicially enforced. The guidelines are more akin to internal operating instructions as opposed to regulations. As such, they do not have the force and effect of law;" also, the guidelines were sent in the form of a memorandum to INS employees and were not intended to grant substantive rights, but only were intended to give guidance to those INS employees involved in the interdiction program), cert. denied, 502 U.S. 1122 (1992); Fano v. O'Neil, 806 F.2d 1262, 1264 (5th Cir. 1987) ("We have held [INS Operations Instructions] to be nonbinding not because they do not affect the individuals dealing with the INS but because they are not an exercise of delegated legislative power and do not purport to be anything other than internal house-keeping measures") (emphasis added); Kwon v. INS, 646 F.2d 909, 918-19 (5th Cir. 1981) (INS Operations Instructions "furnish only general guidance for service employees"); Ponce-Gonzalez v. INS, 775 F.2d 1342, 1346 (5th Cir. 1985) (INS OI are "only internal guidelines for INS personnel, and neither confer upon [the alien] substantive rights nor provide procedures upon which he may rely"). Like the INS guidelines and Operations Instructions at issue in the above cases, the Commissioner's Memorandum merely provides internal guidance for INS employees in the carrying out of their official duties; as such, the penalty factors outlined in the Memorandum cannot be considered binding on the Court in setting an actual civil money penalty amount.

The factors outlined in the Commissioner's Memorandum merely indicate how the INS proposes the civil money penalty amount it will request in a 1324c proceeding. I reject the notion

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[31] Although I reject the Commissioner's Memorandum as binding on and relevant to this proceeding, that does not mean that I refuse to consider any or all of the penalty factors outlined in that Memorandum on their own merit. I merely hold that I am not compelled to follow those factors simply because they appear in the Memorandum.

that a penalty proposed by the INS is legally presumptively proper. See FPO at 3, ¶ 3.B.2. (listing as a disputed legal issue whether "the INS fine against Respondent was legally presumptively proper"). Respondent correctly demonstrates the invalidity of such a notion:

> First of all, 28 CFR Sec. 68.52(b) specifically assigns to the ALJ the authority and duty to consider the evidence presented and to apply the preponderance of the evidence standard of proof. Second, 28 CFR Sec. 68.52(c)(3)(A) provides [as does 8 U.S.C. § 1324c(d)(3)(A)] that the ALJ is to include in his order the amount of the civil money penalty between $250 and $2000, thereby asserting by implication that it is the ALJ who is to have discretion in the matter.

Rbr. 6-7. Respondent also correctly points out, see Rbr. 7, n.2, that the ALJ must issue his or her decision "in accordance with the regulations and rulings of the statute or regulations conferring jurisdiction," 28 C.F.R. § 68.52(b) (1997).

When setting a civil money penalty in any case, I am concerned with reaching an independent judgment, based on all appropriate record evidence, concerning a fitting penalty amount. Another reason that I reject the Commissioner's Memorandum factors as dispositive is because they do not consider any mitigating factors. To reach a fair penalty, all appropriate factors, both aggravating and mitigating, must be considered. OCAHO ALJs have considered a variety of factors in setting appropriate civil money penalties in document fraud cases. The judges occasionally have borrowed factors considered in paperwork violations cases brought pursuant to 8 U.S.C. § 1324a[32] that are appropriate in document fraud cases. See Diaz-Rosas, 4 OCAHO at 992-93, 1994 WL 752313, at *5 (borrowing the factor from 8 U.S.C. § 1324a(e)(5) regarding whether the violation relates to an individual unauthorized for employment in the United States). In Diaz-Rosas, Judge Schneider also considered the facts that the respondent had purchased the fraudulent document in question, used the document to gain employment, used the alien number assigned to him by the INS on the fraudulent document, and was a repeat offender of the immigration laws of the United States. See id. at 992-94. The seriousness of the violation committed also has figured into the penalty-setting calculus. See Villatoro-Guzman, 4 OCAHO at 540, 1994 WL 482550, at *7 (accepting the complainant's position that the respondent's procurement and use of fraudulent documents was serious because it frustrated Congress' scheme to deter illegal immigration). In approving a maximum penalty for a first-time offender's acts of knowingly forging, counterfeiting, altering, and falsely making eight temporary immigration documents, Judge McGuire considered the "respondent's maturity, his admittedly knowing participation in a conspiracy to provide fraudulent INS work authorization documents to illegal aliens, his prior criminal conviction of two (2) counts of Transfer of Counterfeit Government Obligations, and the sole motivation of monetary gain for his actions." Noriega-Perez, 6 OCAHO 859, at 16, 1996 WL 454997, at *14. As the sampling of

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[32] In setting a civil money penalty for paperwork violations, the ALJ must consider the following five factors: (1) size of the business of the employer being charged; (2) the employer's good faith; (3) the seriousness of the violation; (4) whether the individual was an unauthorized alien; and (5) the history of prior violations. 8 U.S.C. § 1324a(e)(5) (1994).

factors discussed above indicates, the types of appropriate aggravating and mitigating factors can depend in large part on the particular circumstances of the individual case. The factors that I find compelling in setting the civil money penalty in the case at hand are discussed below.

2. Aggravating factors

a. Seriousness of the violations

Under this factor, I examine the inherent seriousness of the type of violation(s) involved in the case.[33] Here, there are two general categories of violations: the manufacture of fraudulent documents (whether by counterfeiting, falsely making, and/or forging them) and the providing of fraudulent I-94 documents. I conclude that both types of violations are serious.

A respondent's procurement and use of fraudulent documents (an alien registration card and a social security card) have been judged "a serious offense which interferes with Congress' scheme to deter illegal immigration." Villatoro-Guzman, 4 OCAHO at 540, 1994 WL 482550, at *7. In the present case, Dominguez' manufacture and provision of fraudulent I-94 documents likewise hindered Congress' plan to deter illegal immigration and, thus, should be deemed serious. As discussed above in part III.B, the ultimate recipients of the counterfeit I-94 forms that Respondent distributed all were illegal aliens, Tr. at 271 (testimony of Agent Jones), and almost all of the I-94 forms listed in the Complaint were designated for employment authorization and/or to permit multiple entries into the United States, see CX-I-1-206. The I-94 form enables illegal aliens with such forms to obtain employment, which displaces United States citizens and resident aliens; that defeats one of the purposes of the INS and the immigration laws, which is to prevent people from entering the country illegally and obtaining illegal employment. Tr. at 270 (testimony of Agent Jones); see also 8 U.S.C. § 1324a(a), (b)(1) (1994).

Creating and selling fraudulent immigration documents that allow an alien to enter/remain in the country is inherently serious for an additional reason. When fraudulent documents are made and sold, the usual safeguards for preventing criminals from entering the country that are in place when an official government authority creates and provides legitimate documents are completely bypassed. This can allow potentially dangerous criminals access to the country that they might not otherwise be able to obtain. Cf. infra part IV.B.2.g.

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[33] I consider the inherent seriousness of the violation separately from any particular factors in a specific case that make the prohibited acts serious. The particular factors that demonstrate heightened seriousness in this case, beyond the seriousness inherent in manufacturing and providing fraudulent immigration documents, will be discussed in detail below.

b. Breach of trust, abuse of position, use of special knowledge

Aside from the fact that manufacturing and providing fraudulent immigration documents is serious in and of itself, there are a number of factors that make Dominguez' acts in this particular case especially egregious. The most distressing element of all the aggravating factors in this case is Dominguez' breach of the public trust and abuse of his position as a federal law enforcement officer. See CX-PP-13-19; Tr. at 141, 271. Dominguez was a Border Patrol agent and then an ASU agent with the INS for approximately twenty-four years, from the time he joined the INS in 1969 until he retired in 1993. See CX-VV-25, 59; CX-A-1. Dominguez had the most years in service of anyone at the Laredo ASU. Tr. at 16. As a federal law enforcement officer, Dominguez had a duty to uphold the law, particularly the immigration laws that it was his specific responsibility to enforce. He abandoned that duty by putting into motion and perpetuating a document fraud scheme that violated the very laws he was obligated to enforce. Dominguez' betrayal of the law and the public trust was compounded by his use of INS confidential informants, some of whom he recruited himself to work for the INS, to carry out his document fraud scheme as vendors to solicit sales of counterfeit documents to aliens and as distributors of those counterfeit documents. See Tr. at 23, 29, 32-33, 56.

Respondent exploited the special knowledge he gained as an INS agent to counterfeit the documents in question in this case. Because of Agent Villarreal's demonstrated experience with the INS and with fraudulent documents in particular, see Tr. at 162-65, I credit his testimony that the I-94 forms Respondent made were of good quality and very professionally made, see Tr. at 184-85, and that someone who did not work for the INS would not be able to produce documents of that quality, see Tr. at 186.

Respondent testified that blank I-94 forms, stamps, inks and other tools that he used to counterfeit the documents were commercially available. See Tr. at 59 (Respondent discusses the easy availability of blank I-94 forms and how anyone may order and purchase them from the superintendent of documents in Washington, D.C.); see also Tr. at 207 (Agent Villarreal admits that a stamp Respondent used probably was ordered); Tr. at 330-31 (Agent Jones admits that the items Respondent used in his counterfeiting scheme were purchased on the open market). Respondent also argues, see Rbr. 19, that anyone could create a fraudulent I-94 form merely by copying a valid form, see Tr. at 205-07, 329-30. The fact that the items Respondent used to counterfeit the documents are generally available, however, does not mean that just anyone in the general public knows as an initial matter what items to acquire and how to use them to create a convincing counterfeit. As Agent Jones testified, see Tr. at 331, most of the seals Dominguez used were not complete seals and had to be used in conjunction with each other to create a finished product. Respondent's special knowledge helped him to select the right materials to use and to know how to use them to create a good quality counterfeit document. I find it utterly absurd to suggest that just anyone could create fraudulent immigration documents of as good a quality as a person who had spent an approximately twenty-four-year career working with such documents. Also, as even Respondent admits, see Tr. at 62, the easy availability of blank I-94 forms did not justify his counterfeiting of such forms.

Dominguez abused his position of trust as a law enforcement officer and took advantage of his specially acquired knowledge to perpetrate his document fraud scheme. I wholeheartedly agree with U.S. District Judge Kazen's assessment at Dominguez' criminal sentencing hearing that "[i]t would seem to me impossible to look at what happened here and not consider[] it a gross abuse of trust." See CX-PP-13.

c. Impact on law enforcement at Laredo ASU

Dominguez' actions had a devastating impact on the law enforcement efforts at the Laredo ASU. The OIG and INS investigation that ensued after the discovery of a counterfeiting operation that involved a former special agent and INS confidential informants completely disrupted normal law enforcement activities. After Respondent's arrest, the entire ASU came under scrutiny as possibly involved in the fraud, and every confidential informant who came through the Laredo point of entry was thoroughly interrogated. See Tr. at 187. The Laredo ASU lost most of its informants because none of them wanted to go through the trouble of a thorough interrogation. See Tr. at 187. Also, Respondent's involvement of Banda and other confidential informants in an illegal counterfeiting ring meant that the informants could not be trusted or used by INS any longer. Banda had been a good and valued informant who had provided useful information in the past, but it became impossible to work with him after his part in the counterfeiting scheme. See Tr. at 196-97. Because of the informants' ability to gain access to individuals involved in illegal activity, it was very difficult for the ASU to work without them. See Tr. at 187-88.

The impact of the informant problem and the ongoing OIG investigation combined to diminish law enforcement activity at the Laredo ASU to almost nothing for six months to a year. See Tr. at 188-89. Practically nothing occurred in the office, besides the investigation, for nearly a year. See Tr. at 188-89.

d. Scope of the operation

Dominguez' counterfeiting did not occur as an impromptu incident. It took place over a number of years, involved a large number of documents, and occurred in such a manner that reveals a high degree of planning and calculation on Respondent's part. Although it is uncertain exactly when Respondent began to conduct his counterfeiting operation, evidence found at Respondent's home at the time of the search indicates that his scheme occurred over a number of years and started sometime prior to November 29, 1990. During the search, agents discovered fraudulent documents containing dates that were prior to the effective date of the law that created the civil document fraud cause of action. See Tr. at 318, 337. The civil document fraud provisions were added to the INA by the Immigration Act of 1990, which was enacted November 29 of that year. Therefore, Respondent had started the operation sometime before November 29, 1990.

The counterfeiting operation continued until Respondent was arrested in September 1993. See Tr. at 95. Dominguez did not voluntarily cease the illegal activity. But for the arrest, the operation may have continued for some time, especially since Respondent had many documents in his possession in his house at the time the search warrant was executed. See CX-SS-14.

Dominguez' ring was a large-scale, organized, well-planned and detailed enterprise. During the search of Respondent's residence, agents found in a locked filing cabinet a vast array of items that related to the counterfeiting operation, including an array of stamps, unused permits, a number of blank and counterfeit I-94 forms as well as blank and completed social security cards, passports, alien resident cards, various types of identification cards, birth registration forms, baptismal certificates, various kinds of instructions, maps, equipment, ink pads, and seals and stamps to make I-94 forms. See Tr. at 175-76; CX-H-1-18.

Respondent maintained an organized record keeping system for his counterfeiting enterprise. Respondent photocopied most of the I-94 forms he created, see CX-VV-227-28, 234-35, 352; CX-A-14, and maintained a sort of filing system in which the copies of executed I-94 forms were kept together in an organized manner, see Tr. at 177. Respondent also maintained notes on which he recorded amounts owed. See Tr. at 178. In addition, Respondent maintained instructions, written in Spanish, that told aliens, in the event they were arrested by INS officials, to say they were witnesses in San Antonio or Dallas and were traveling, and to destroy these instructions after learning them. See Tr. at 176-77.

The broad collection of counterfeiting tools, the organized record keeping system, and the instructions to the aliens indicate that Dominguez put a high degree of thought, preparation and calculation into his counterfeiting enterprise. That, combined with the magnitude of the operation, adds a heightened degree of seriousness to Dominguez' violations. Any counterfeiting of immigration documents, even when it occurs in isolated incidents, defeats the purposes of the immigration laws; however, a well-organized and large-scale operation poses an even greater threat to the goals embodied in those laws. A large-scale enterprise, like the one in the present case, puts fraudulent documents into the hands of many people who otherwise would not be able to enter, to remain in, or to work in the United States. Also, a well-planned and organized operation, like Respondent's, stands a greater chance of avoiding detection for a significant period of time. This case perfectly demonstrates that idea because Dominguez had been creating fraudulent documents since before November 29, 1990, and never was caught until September 1993.

e. Purpose of the fraud

Dominguez conducted the counterfeiting operation for profit, not for the benefit of his family or friends, or for any other purpose. Banda's testimony reveals that Dominguez charged $200 for each document he produced and that Dominguez never provided a document for free or as compensation for the informants' supplying of information. See Tr. at 85, 87, 90-91; CX-D-4; CX-SS-6, 9, 11-12. The notes that Respondent kept with the copies of I-94 forms and other

counterfeiting equipment regarding the amounts the informants/distributors owed also support the idea that Respondent charged money to create the fraudulent documents and that he was motivated by pecuniary gain. See Tr. at 178.

Respondent suggests that the money he received was for the repayment of loans he had made to the informants, and that he only collected the money if the informants wanted to pay. See Tr. at 29-31. That testimony is simply not credible. Respondent makes those contentions in an evasive manner trying to avoid direct questions from Complainant's counsel:

> Q [by Mr. Lewandowski] Okay. Now, isn't it true you were accepting money from Mr. Banda for those I-94 forms?
>
> A [by Respondent] He was paying me back money that he owed me.
>
> Q Would it be true to say, Mr. Dominguez, that you were accepting $200 per document before you would prepare the fraudulent document?
>
> A I never did tell him that it was part of the fee that he was charging. If he charged that much, it was his idea.
>
> Q Well, let me make the question more clear, Mr. Dominguez. Isn't it true that you, in order to make the fraudulent I-94, would require $200 in advance from Mr. Banda? Isn't that true?
>
> A If he wanted to pay me back something -- he didn't have to, because I made a lot of them for just for free, because he asked for them free.
>
> Q Again, Mr. Dominguez, please answer the question I'm asking you. Isn't it true that you were charging Mr. Dominguez [sic] $200 per document before you provided --
>
> A If he wanted to give me that amount, well, yes, I did take it, especially the last three that I -- when I was arrested.
>
> Q The last three.
>
> A Right.
>
> Q Are you saying, then, that the rest of the documents you provided, you did not charge him?
>
> A Like I said, sometimes we did; sometimes we didn't.

Tr. at 29-30. Not only is Respondent's explanation not credible, but it is directly refuted by the existence of the notes Respondent kept in which he recorded the amounts different informants owed him for orders of fraudulent documents. See Tr. at 178. Those notes also refute Respondent's argument, see Rbr. 3 (RPFF 9), that he provided fraudulent documents to the informants out of concern for their economic privation.

With respect to informant Camacho, Respondent first states that money he received from Camacho was for the repayment of loans, but then he states that he "did inflate the fees" he charged Camacho to discourage Camacho from asking for more documents because he did not want to give Camacho more documents. See Tr. at 31-32, 52. As an initial matter, the internal contradiction of those explanations greatly detracts from their credibility. Secondly, Respondent's explanation about

wanting to discourage Camacho from requesting documents is independently not credible. If Respondent truly did not want to provide any more documents to Camacho, he simply could have refused to do so. Respondent's attorney elicited testimony regarding the idea that Respondent continued to make the documents because he was afraid the intermediaries would turn him in to authorities as a means of retaliation. See Tr. at 53. That fear, even if it were true, certainly is not reasonable; the intermediaries would not be likely to turn him in when doing so only would highlight their own illegal activities. Despite Dominguez' claims to the contrary, it is clear that he charged money to make the fraudulent I-94 forms and that financial gain was the real objective of his scheme.

f. Respondent initiated the scheme

Respondent initiated the illegal counterfeiting operation. See Tr. at 83-84 (trial testimony of Banda); CX-SS-5-6 (Banda's sworn statement taken August 30, 1996). At trial, Complainant's counsel asked Respondent very specific questions about who initiated the scheme, but Respondent never answered the questions directly and persisted in offering evasive replies. See Tr. at 27-29. The record evidence points to no conclusion other than that the counterfeiting scheme was Respondent's idea and that he was responsible for initiating it.

g. Lack of concern regarding who ultimately received the documents

Dominguez did not know to whom his distributors were selling the counterfeit I-94 forms. Banda states that Respondent told him not to sell the documents to criminals, see Tr. at 88, but, assuming this is true, such an instruction would have been nothing more than a mere gesture given the fact that Respondent did not trust Banda's word. Dominguez expressly acknowledges that he "didn't believe every story" Banda told him. Tr. at 73. Dominguez' lack of trust for Banda is exemplified in the account Dominguez gives regarding work Banda had performed for him:

> [Banda] did work on my son's car one time, and he took it to Mexico and had a real expensive radio there. When he came back, he came minus the radio. He said it had been stolen, but that was a story he gave me all the time, that something was stolen. And I don't think it was stolen.

Tr. at 48. Since Dominguez did not trust Banda, any instructions he gave him about not selling the documents to criminals were meaningless. Also, there is no evidence that Dominguez followed up on those instructions, or that he had any type of oversight or control of what Banda and the other distributors did with the documents.

Respondent states that Madera told him the documents he provided to Madera were for friends of Madera, and that he believed that because Madera "had been [an] informant for me for a long time." Tr. at 53. Respondent, however, immediately starts to back off his testimony about why he believed Madera:

> [Madera] had been [an] informant for me for a long time -- well, I say for a long time, but it might have been a year or two. I'm not sure exactly. It was on and off. These people never were constant, you know. They just disappear for a while, and then they come back after a year or two, something like that.

Tr. at 53. That explication shows that Dominguez really had no basis for believing Madera.

Dominguez concedes that he did not know who ultimately received the documents he counterfeited and distributed through his informants/intermediaries. See Tr. at 66-68. Respondent was aware that informants worked with criminals, see Tr. at 67, and he indicated that Madera had spent time in jail in Mexico, see Tr. at 53, and that Camacho had some sort of sordid history, see Tr. at 67. Respondent said he knew the informants had "done something wrong at one time or other," and he acknowledged that the friends of informants also likely would be involved with crime, alien smuggling, and other similar activities. See Tr. at 67-68. Despite that knowledge, Respondent never monitored, or even inquired about, to whom the informants gave the documents. See Tr. at 68. The documents Respondent provided could have been sold to criminals, narcotics traffickers, other organized crime organizations, and possibly even terrorists, because disreputable characters are the types of people with whom informants associate. See Tr. at 367. I do not find that the documents Respondent distributed did go to criminals; it is Respondent's remarkable lack of concern about who ultimately received and used the documents he created and provided that warrants aggravation of the civil money penalty.

h. Lack of remorse, desire to destroy evidence

Respondent's statements immediately after his arrest and at trial reveal that he bears no remorse for this actions. Soon after his arrest in September 1993, Dominguez telephoned his wife at their residence. He was unable to reach her there, so he left a message on their answering machine informing her that he was in the county jail, that the authorities were trying to obtain a search warrant to search their house, and instructing her when she got home to "burn up everything in [his] closet." See CX-UU-1; Tr. at 37-38. A bedroom closet was where the INS officials found the evidence of his document fraud activities when they executed a search warrant at the Dominguez' residence during the early morning hours after Dominguez' arrest the previous night. See Tr. at 174-76; CX-H-1-18. Respondent says he was under stress when he made that statement. See Tr. at 38. That is undoubtedly true, but Respondent also admits that he asked to make the call and that no one compelled him to call, see Tr. at 38.

The passage of time apparently has done little to change Dominguez' outlook on his conduct. At trial in January 1998, more than four years after he left instructions to his wife to destroy the evidence in his closet, Dominguez again expressed a wish that he had destroyed the evidence against him. Dominguez stated that he would have destroyed all the evidence if his memory had been better. See Tr. at 492-93. That statement reflects a present and ongoing lack of remorse and lack of acceptance of responsibility for his actions. Respondent's statement indicates that his only regret is the fact that he was caught.

3. Mitigating factors

a. Cooperation in the OIG investigation

Dominguez cooperated in the OIG investigation that ensued after his arrest. He took several polygraph examinations, and he did not refuse any interviews that the investigators requested. See Tr. at 453, 455-56. Assistant U.S. Attorney Flores, who prosecuted Dominguez in the criminal case, recognized that Dominguez participated in polygraph examinations, see Tr. at 144-45, and in "a number of debriefings," Tr. at 139. Agent Jones also agreed at hearing that Dominguez gave substantial quantities of information about his involvement in this case. See Tr. at 326.

Complainant argues that Respondent has failed to establish cooperation as a mitigating factor. One of the statements Complainant makes in support of that idea is that "[w]hen Respondent was arrested he made no statements to the Government, he did not confess; he did not begin to talk until the plea agreement was made." Cbr. 14-15 (emphases added) (citing Tr. at 34, l.7;[34] Tr. at 37, ll.2-3). That argument is utterly amazing. Dominguez was under no obligation to incriminate himself. See U.S. Const. Amend. V. In setting a civil money penalty in this case, I certainly am not going to find that Dominguez did not cooperate on the basis that he asserted a Constitutional right.

Complainant also argues, based largely on testimony from the attorney who prosecuted Respondent's criminal case, that Respondent did not provide "substantial assistance" to the government investigation. Assistant U.S. Attorney Flores said Respondent "did not cooperate in terms of giving to the Government substantial assistance." Tr. at 140. The "substantial assistance" Flores is talking about, however, is a very specific term of art used in Respondent's criminal plea agreement and under the U.S.S.G. See Tr. at 139, 142-43. As Flores defines the phrase, lack of "substantial assistance" does not mean that a person was uncooperative or difficult; instead, it merely means that the person did not provide information that led to the investigation or prosecution of another individual or group that has committed an offense. See Tr. at 139, 142-44.

Even if Respondent did not provide information that led to criminal investigations or prosecutions against additional individuals, that does not mean that he did not cooperate with the authorities. Under the approach Flores outlines, an individual who knows nothing else that would lead to the investigation or prosecution of another individual is incapable of rendering "substantial assistance." Flores indicates that he did not believe Dominguez was telling everything he knew, see Tr. at 151-54, but that is just Flores' opinion, and he did not provide any specifics. Additionally, Flores was not aware of the report made about the investigation of Camacho that Respondent's cooperation had sparked. See Tr. at 148-49; CX-QQ (OIG Report of Investigation prepared by Agent Widnick regarding Camacho); CX-QQ-1 (stating that the "[i]nvestigation was predicated upon information received from the prosecution and subsequent debriefing of Pedro DOMINGUEZ") (capitalization in original).

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[34] Line 17 of page 34 of the hearing transcript relates in no way to the cited statement. Complainant probably intended to cite line 17.

Further, OIG Agent Widnick concluded that Dominguez had fully cooperated with the OIG. See Tr. at 456. As part of OIG's investigation, Dominguez took several polygraph examinations and complied with all requests for interviews; there is no record evidence to indicate that he was uncooperative with respect to those examinations or interviews, or that he lied during the examinations or interviews.

b. No history of prior violations

Dominguez has no history of prior violations of the INA's document fraud provisions. Complainant does not allege otherwise. See Tr. at 340.

c. Punished for same conduct in the criminal case

Respondent already has been punished in the prior criminal case for essentially the same conduct that is at issue in this case. In the criminal proceeding, Respondent was sentenced to a term of fifteen months imprisonment, with three years supervised release, and was assessed a fine of $15,000. See CX-OO-2-4; CX-VV-80. Respondent has served time in jail, and currently is subject to parole through October 21 of this year. See Tr. at 410-11. Respondent also has paid his criminal fine. See CX-VV-80; RX-I-1. While there is no double jeopardy bar to this proceeding,[35] the extent of his prior punishment should mitigate to some extent the penalty assessed in this proceeding.

4. Not proven and/or not relevant factors

a. Respondent's effectiveness as an INS agent

Complainant points to testimony, see Cbr. 7 (CPFF 20), that Respondent was not an effective agent and did not make arrests or cases during the last part of his years working at the INS, see Tr. at 75-76, 249. The record evidence does not show that Respondent was anything but a federal employee in good standing when he retired. He received fully successful performance ratings. RX-D-10. Moreover, whether he was an ineffective or unproductive federal employee is not relevant to this civil penalty proceeding. If his INS supervisors believed that he was an ineffective agent during his employment, they could have given him unsatisfactory performance evaluations or taken other measures to discipline him. They did not do so during his employment, and I will not credit any such allegations at this late date.

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[35] I previously found that Respondent waived double jeopardy for the purposes of a civil administrative proceeding being brought after his criminal conviction. See Double Jeop. Order at 9-10 (adopted by CAHO). Regardless of my finding of waiver, it is unlikely that double jeopardy would have barred this civil administrative proceeding after the criminal proceeding for essentially the same underlying activities. See Hudson v. United States, 118 S. Ct. 488 (1997).

b. Use of confidential informants to perform personal work

Complainant points to evidence, see Cbr. 5 (CPFF 9), that Dominguez hired Banda to perform personal work for him, such as yard work, car repair, house painting, ditch digging and pipe installation, see Tr. at 48-49. Complainant poses questions about whether such conduct is contrary to INS policy, see Tr. at 189-193, 300; while the answers to those questions demonstrate that it probably would not be a wise idea for INS agents to engage CIs to perform personal jobs for them, they do not establish that a clear, explicit INS policy or rule existed that prohibited such conduct. Even assuming there is such a policy, violation of it might provide a basis for disciplinary action against Respondent, but such a violation would have no relevance to this civil penalty proceeding.

c. Embarrassment to the INS

Agent Jones' testimony indicates that embarrassment to the INS as a result of Respondent's activities was considered in proposing the requested civil money penalty. See Tr. at 389-90. Any embarrassment that the INS experienced is not the same thing as impact on law enforcement activities. I have considered as an aggravating factor the tangible impacts on law enforcement that resulted from Respondent's counterfeiting scheme, see supra part IV.B.2.c, but I will not consider the mere fact that the INS was embarrassed. Embarrassment is irrelevant to setting a civil money penalty.

d. Amount of money government spent pursuing this case

Complainant has presented evidence regarding the amount of money it has spent pursuing this case. See CX-CCC. Respondent argues that amount shows "that the government is out for revenge in punishing Dominguez." Rbr. 22. I find that the amount Complainant spent pursuing this case is irrelevant for purposes of demonstrating any factors, whether aggravating or mitigating, that play a part in setting the civil money penalty.[36] Therefore, CX-CCC is irrelevant, and I do not consider it in setting an appropriate penalty in this case.

e. Alleged threats against Banda and his family

Banda indicates that Madera, another informant involved in Respondent's document fraud scheme, went to Banda's mother's home in Nuevo Laredo, Mexico, and threatened Banda sometime after Respondent's arrest. See Tr. at 97-98, 122-25. Banda says that, at least on one occasion, Madera was armed with a gun. See Tr. at 98, 122-24. Banda also says that Madera told him that he had "behaved very badly with Mr. Dominguez." Tr. at 98. Even if it is true that Banda and/or his family was threatened by Madera, the record evidence does not show that Respondent is linked to those threats or intimidation. Assuming that Madera threatened Banda and/or his family in the

[36] Later I will address Complainant's argument, see Cbr. 40-41, that the cost of Complainant's investigation and prosecution of this case is relevant to the excessive fines analysis. See infra part VI.

manner Banda describes, there is no evidence that Dominguez sent Madera or asked Madera to act on his behalf. If Madera threatened Banda, he could have been acting out of purely personal reasons, e.g., because he was angry that Banda had revealed Respondent's role and that the counterfeiting scheme was interrupted so that he no longer had a source of fraudulent documents. Most significantly, however, Banda testified unequivocally at trial that Dominguez never threatened him. See Tr. at 99.

f. Small amount of profit from the enterprise

Respondent alleges that he derived a small pecuniary gain from the sale of documents involved in this case. He contends that he obtained less than $10,000 from the sale of fraudulent I-94 forms through Banda. See Rbr. 3 (RPFF 7) (citing Tr. at 110, ll.2-14); Rbr. 20. I find that contention implausible considering the large number of documents involved and the evidence that Respondent charged $200 for each document he manufactured. Even assuming that Respondent only realized $200 from the sale of each counterfeit document and, thus, only earned a total of $19,400 ($200 x 97 documents) for the documents found to be the subject of violations in this case, the purpose of a civil money penalty action is neither restitution nor disgorgement. Therefore, the amount of civil money penalty is not limited by the amount of money that Respondent has profited from his unlawful activity. The government does not proceed on the theory of disgorgement, nor has it attempted to set the amount of money Respondent made from his illegal operation. Rather, the purpose of a civil money penalty proceeding is deterrence and punishment. If the penalty merely disgorged the ill-gotten gain, it would not serve as either punishment or deterrence. Therefore, it is not inappropriate to impose a penalty that is considerably larger than the amount of gain.

g. Failure to prosecute others involved in the scheme

Respondent argues that "[t]he government's view of the seriousness of the violations should . . . be viewed in light of the fact that virtually no attempt to invesigate [sic] the illegal aliens [was] made even after their names, dates of birth and photograph[s] were in the possession of the government." Rbr. 19 (citing Tr. at 239-40, 342-46). Banda testified that the INS investigators never asked him the names of the people who referred him clients for the I-94 forms, and that they never interviewed him as extensively about the document fraud operation as Respondent's counsel did. Tr. at 111. There is some record evidence that others were prosecuted (e.g., Dario Madera). See CX-RR-17. While the record does not show whether all the informants who participated in the counterfeiting operation, or the illegal aliens who purchased and used the documents, were prosecuted, the absence of such criminal and/or civil prosecutions is not a mitigating factor in this case. The government has a large degree of discretion to determine which cases to prosecute, which may depend on various factors, such as the strength of the evidence, the best use of limited prosecutorial resources, etc.

h. Vindictive prosecution

Respondent raises the idea "that the government is out for revenge in punishing Dominguez." Rbr. 22. If Complainant had engaged in a vindictive prosecution of Respondent, as that term has been defined in the case law, that would have been relevant to this case, but Respondent has not proven that such an event occurred. As defined by the case law, "[v]indictive prosecution is a prosecution to deter or punish the exercise of a protected statutory or constitutional right." Secretary of Labor v. National Eng'g & Contracting Co., 18 O.S.H. Cas. (BNA) 1076 (O.S.H.R.C. Sept. 30, 1997), 1997 WL 603013, at *2 (citing United States v. Goodwin, 457 U.S. 368, 372 (1982)). "Although there is no uniform test for proving that a prosecution was vindictive, a threshold showing common to all tests is evidence that the government action was taken in response to an exercise of a protected right." Id. Respondent has not alleged that Complainant was motivated in bringing this case, in requesting a certain penalty amount, or in acting in any other way, to retaliate against him for any protected statutory or constitutional right he has exercised. Therefore, there can be no finding of vindictive prosecution in this case.

Instead, Respondent argues more broadly that:

> The government's obvious anger is directed at Dominguez because of the job he held. It is not based on the crime. Ordinarily, the prosecutorial arm of the government stands as a moderating force between the victim and the accused. A victim's natural desire for revenge is tempered, through the objective prosecutorial process, by the societal factors of fairness and trying to make the punishment fit the crime. That is lacking in this case.
>
> In this case the government sees itself as the victim. The government is angry and wants to exact its revenge.

Rbr. 23. Respondent makes a good point, but that does not change the fact that this argument does not constitute a legal defense, either to liability or to penalty. Other types of cases exist in which the government prosecutes cases in which it is more directly the victim than in this case. For example, the government brings False Claims Act cases against parties who wrongfully have obtained payments from the government. Additionally, even if Complainant sees itself as having a more personal stake than normal in this case, that certainly does not diminish the wealth of evidence that shows Respondent's violations of the law were egregious and that his violations are especially serious because of the unique circumstances of this case, not the least of which was Respondent's position as a law enforcement official who had a particular duty of trust to uphold the very immigration laws that he violated.

5. Civil money penalty amount set

With respect to document fraud violations committed by a first-time offender, the version of section 1324c that applies to this proceeding, see supra part IV.B.1.a., mandates a civil money

penalty in an amount "not less than $250 and not more than $2,000 for each document used, accepted, or created and each instance of use, acceptance, or creation,"[37] see 8 U.S.C. § 1324c(d)(3) (1994). In evaluating the appropriate penalty, I begin with the minimum statutory amount of $250, which apparently is the same method used by Complainant, see Tr. at 267-68 (testimony of Agent Jones), and then consider whether there are any aggravating or mitigating factors. At the outset I would note that I reject the government's contention that there are no mitigating factors in this case or that Respondent did not cooperate in the government's investigation. That assertion is not supported by the record, see supra part IV.B.3, and, in fact, the statements of the government's own employees reveal that Respondent cooperated in the investigation, see supra part IV.B.3.a. Having said that, however, I must note that there are few mitigating factors and many aggravating factors in this case.

In its posthearing brief, Complainant requests that I assess the maximum $2,000 penalty for each of the ninety-seven violations established in Count I and each of the ninety-seven violations it requests that I find in Count II,[38] for a total penalty of $388,000. Cbr. 49. Neither a maximum penalty per violation, nor a penalty in the amount of $388,000, is justified in this case. Certainly, these were serious violations of the law. Indeed, in the criminal case against Dominguez, the U.S. District Judge concluded that this was a very aggravated case. CX-PP-26. Nevertheless, in the criminal case the U.S. Department of Justice did not request, and the Court did not impose, the maximum penalty (either as to imprisonment or fine) permitted either by the statute or by the U.S.S.G. The criminal statutes provided for a maximum imprisonment of five years and a maximum fine of $250,000. See CX-NN-8. The U.S.S.G. provided for a fine between $3,000 and $30,000 based on a level 13 violation, but the District Court assessed only a fine of $15,000. See CX-OO-4, 6; CX-PP-42. Therefore, the District Court only imposed a fine in the mid-range between $3,000 and $30,000.

Here, a civil money penalty in the mid-range would be approximately $1,000 per violation, or a total penalty of $151,000 for the combined 151 violations in Counts I and II. However, I am not bound by the District Court's approach, and, moreover, I would note that, in the criminal case, the main focus was prison time, not the fine.

Respondent has argued for a penalty less than the maximum permitted under the statute, noting his family obligations, his income, earning capacity and financial resources, and the lack of pecuniary loss inflicted on others as a result of the violations. See Rbr. 10. Respondent derives

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[37] Although section 1324c(d)(3) does not reference "possess" or "provide," the CAHO has ruled that the statute also "requires the imposition of civil money penalties for 'possessing' or 'providing' documents in violation of § 1324c." Dominguez, 7 OCAHO 972, at 7 (CAHO Modification).

[38] While I have, indeed, found 97 violations with respect to Count I, I do not agree with Complainant that all 97 of those documents also are subject to Count II violations. Instead, I only have found 54 violations with respect to Count II. See supra part IV.A.3.

these considerations from 18 U.S.C. § 3572, which sets out factors the court shall consider in setting a fine in federal criminal cases. Respondent states that the court in Corder v. United States, 107 F.3d 595 (8th Cir. 1997), looked to that section, among other sources, for guidance in determining the factors to be considered in assessing a civil penalty in a situation in which Congress had not delineated specific factors to consider under the civil provision in question. See Rbr. 10. That court, however, merely listed certain section 3572 factors as examples of how "Congress has specified the factors that are relevant in imposing criminal fines," see Corder, 107 F.3d at 597; there is no indication that the court used those factors in determining that the civil fine that had been imposed was arbitrary and capricious, see id. at 598. In fact, the court indicates that it borrowed some penalty criteria for the case, which was brought by the Department of Agriculture's Food and Consumer Service, from other statutes administered by the Department of Agriculture. See id. at 597-98. At any rate, it is clear that the criminal fine factors established in section 3572 do not bind me in determining an appropriate civil money penalty in this case.

Having said that, however, I note that some of the factors Respondent has listed, such as his financial situation and family obligations, could impact on his inability to pay defense. As such, they will be addressed below in part V. Before I address the inability to pay defense, I first will calculate a civil money penalty based on the statutory range and any appropriate aggravating and mitigating circumstances. After that I will consider Respondent's inability to pay defense to the penalty amount; if I find that Respondent has supported his defense and has demonstrated an inability to pay the calculated amount, then I will decrease the amount of the civil money penalty accordingly.

I consider the counterfeiting operation to be very serious and worthy of a substantial penalty. However, I do not agree with Complainant that a penalty of $388,000 is warranted. Complainant points to United States v. Noriega-Perez, 6 OCAHO 859, 1996 WL 454997, petition for review filed, No. 96-70513 (9th Cir. 1996), in support of imposing the maximum penalty in this case. In that case, however, Judge McGuire imposed the maximum penalty only with respect to the section 1324c(a)(1) violations in count I relating to eight documents that the respondent forged, counterfeit, altered and falsely made. Noriega-Perez, 6 OCAHO 859, at 16, 1996 WL 454997, at *14. Complainant argues that the facts of the case at hand, particularly Respondent's breach of trust as a federal law enforcement and the impact on law enforcement at the Laredo ASU, make the violations in this case even more serious than those in Noriega-Perez, and, therefore, that this case warrants imposition of the maximum penalty. See Cbr. 47-48. However, while Judge McGuire imposed the maximum penalty as to the eight temporary immigration documents referenced in count I, he only imposed the statutory minimum penalty of $250 with respect to the 320 violations of section 1324c(a)(2) alleged in count II of the complaint relating to the charge of "possession" of 298 counterfeit I-94 documents, twenty-one counterfeit social security cards, and one counterfeit INS Form I-151. The Court imposed a total penalty of $96,000 for the 328 violations in that case.[39]

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[39] In Noriega-Perez, when it filed the complaint, the INS actually reduced the requested penalty of $500 for each of the 320 violations alleged in count II of the NIF, to $250 per

(continued...)

Thus, unlike here, the INS did not seek, and the Court did not impose, a maximum penalty for "possession," but, rather, imposed the minimum penalty. In fact, Noriega-Perez would support the imposition of a minimum penalty, not a maximum penalty, for "possession" of counterfeit I-94 forms.

Moreover, unlike here, in Noriega-Perez, the INS did not seek, and did not obtain, multiple penalties for the very same documents. The documents referenced in count I of the complaint in that case were not the same documents as those referenced in count II of the complaint. (There the INS did not seek separate penalties for "possession" of the eight documents referenced in count I). By contrast, here the INS seeks multiple penalties for the very same documents in both Counts I and II of the Complaint.

Furthermore, unlike the present case, in Noriega-Perez, Judge McGuire found no mitigating factors to balance against the aggravating factors. See Noriega-Perez, 6 OCAHO 859, at 16, 1997 WL 454997, at *14. There are some mitigating factors in this case that have been acknowledged by some in the Department of Justice, see Tr. at 139, 326, but that have been completely ignored by the INS in proposing a penalty, see Tr. at 382 (Mr. Renick's testimony that no mitigating factors were considered in requesting the civil money penalty because the Commissioner's Memorandum does not instruct the INS to consider any mitigating factors). If Respondent's cooperation in the investigation is totally discounted, there would be little incentive for anyone to cooperate. Moreover, in setting a penalty, it is not merely the amount per violation but also the total penalty that must be considered. Although the penalty should punish and deter, it is not meant to destroy an individual. For all the above reasons, I reject Complainant's contention that the maximum penalty should be imposed in this case.

In assessing civil money penalties for paperwork violations under 8 U.S.C. § 1324a, I generally have followed the line of OCAHO cases that have applied a mathematical, rather than judgmental, approach to setting the penalty. See United States v. Carter, 7 OCAHO 931, at 46 (1997), 1997 WL 602725, at *34; United States v. Skydive Academy of Haw. Corp., 6 OCAHO 848, at 10 (1996), 1996 WL 312123, at *9-10; United States v. Felipe. Inc., 1 OCAHO 626, 629 (Ref. No. 93), 1989 WL 433965, at *4, aff'd by CAHO, 1 OCAHO 726, 732 (Ref. No. 108) (1989), 1989 WL 433964, at *5 (holding that the mathematical approach is an acceptable, although not exclusive, approach to setting civil money penalties in paperwork cases). In paperwork cases, the mathematical approach works in the following manner:

> [T]he approach [is] to divide $900, the difference between the statutory $1,000 maximum and statutory $100 minimum, by five for the five statutory criteria

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[39](...continued)
violation in count II of the complaint, thus reducing the total requested penalty from $176,000 to $96,000. Thus, in Noriega-Perez, the INS sought a smaller total penalty in a case that involved more than twice the number of violations proven here.

> [established in 8 U.S.C. § 1324a(e)(5)], arriving at a general amount of $180 for each penalty factor. The $180 per factor is not rigidly applied, because certain penalty factors may justify a greater penalty amount than others.

Carter, 7 OCAHO 931, at 47, 1997 WL 602725, at *34.

I have decided to use the mathematical approach, previously used in paperwork cases, as a model for creating a similar formula by which to calculate an appropriate civil money penalty in document fraud cases. I have decided to adapt the mathematical approach to document fraud cases because it provides a uniform and objective, yet flexible, manner by which to set a civil money penalty amount.

Because there are no specifically mandated penalty factors that I must apply in document fraud cases, I cannot divide $1,750, the difference between the statutory maximum $2,000 and the statutory minimum $250, by a specific number of penalty factors that will remain constant from case to case. Instead, I will divide $1,750 by the total number of penalty factors, both aggravating and mitigating, that I find relevant in each particular case. First, however, I will assign a weight to the factors so that the penalty amount properly reflects the greater emphasis that is warranted by any particularly aggravating or particularly mitigating factors. To achieve this weighting, I start by assigning a base value of one to each penalty factor. Then I increase the value assigned to any particular factors that deserve greater weight than the others. For example, a factor whose value is enhanced to two receives twice as much weight as any individual factor that retains the base value of one. By the same token, if I find that a particular factor is so insignificant compared to the others that it deserves no weight at all, I can assign it a value of zero.

After weighting all the factors, I will add the numerical values assigned to all the factors, both aggravating and mitigating, and divide that total into $1,750 to arrive at an approximate dollar amount that each numerical value is worth. I multiply that dollar amount by the number of numerical values attributable to aggravating factors and, finally, add that product to the statutory minimum $250 to arrive at the civil money penalty amount.

Next, I apply the above process to the facts of the case at hand. I have found eight general aggravating factors in this case: (1) breach of trust, abuse of position and use of special knowledge; (2) impact on law enforcement; (3) inherent seriousness of the violation; (4) scope of the operation; (5) purpose of the violations; (6) the fact that Respondent initiated the scheme; (7) lack of concern regarding who ultimately received the documents; and (8) lack of remorse and desire to destroy the evidence. See supra part IV.B.2. I also have found three mitigating factors: (1) cooperation in the OIG investigation; (2) lack of history of prior violations; and (3) prior punishment for essentially the same conduct in the criminal case. See supra part IV.B.3. Altogether, I have found eleven factors that bear on the amount of the penalty in this case. Of those eleven factors, I find that two of them warrant greater weight than all the rest: (1) Respondent's breach of trust, abuse of position and use of special knowledge as an INS agent; and (2) the devastating impact on law enforcement at the Laredo ASU. I assign a numerical value of three to each of those two factors; i.e., I give each of

those factors three times as much weight as any other individual factor in setting Dominguez' civil money penalty. All the remaining factors retain their base value of one. The numerical values of all the factors total fifteen. Dividing $1,750 by fifteen, each numerical value is worth approximately $116.67. Multiplying $116.67 by the twelve numerical values that are attributable to aggravating factors results in approximately $1,400, which, added to the $250 statutory minimum, would result in a civil money penalty per violation of $1,650.

I set the civil money penalty for each of the ninety-seven violations found in Count I at $1,650, which results in a total Count I penalty of $160,050. However, I depart from the above formula in setting a civil money penalty for Count II. The documents that are the subject of Count II violations are the very same documents charged in Count I. Although the pre-IIRIRA version of section 1324c(d)(3) permits multiple penalties per document if that document is the subject of multiple violations,[40] that does not mean that the same document must receive the same penalty amount for each violation associated with it. Although there is no Blockburger problem with prosecuting and penalizing Respondent for manufacturing and then providing the same fraudulent document, cf. supra part IV.A.1, imposing the same penalty for each of those acts in this case would artificially inflate the penalty against Respondent. Here, the documents were manufactured and then provided as part of the same overarching scheme. I assess a civil money penalty of $500 with respect to each of the fifty-four violations found in Count II, for a total Count II penalty of $27,000. Adding the Count I and II penalties, the total civil money penalty in this case is $187,050. That is a substantial penalty that will serve its goals of punishing Respondent for his very serious violations and serving as an ample deterrent to others who might consider engaging in counterfeiting, forging falsely making and/or providing fraudulent documents.[41] Having set an initial civil money penalty, now it is necessary to consider whether Respondent's inability to pay defense warrants a reduction of that amount.

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[40] The pre-IIRIRA version of the statute provides for a civil money penalty in an mount "not less than $250 and not more than $2,000 for each document used, accepted, or created and each instance of use, acceptance, or creation." 8 U.S.C. § 1324c(d)(3)(A) (1994) (emphases added). After IIRIRA, however, the statute calls for a civil money penalty of "not less than $250 and not more than $2,000 for each document that is the subject of a violation." 8 U.S.C. § 1324c(d)(3)(A) (Supp. II 1996).

[41] Although the assessed penalty is less than that requested by Complainant, it is the largest penalty assessed in a contested OCAHO document fraud case. In United States v. Morales-Guzman, 5 OCAHO 547 (Ref. No. 787) (1995), 1995 WL 706041, a larger total penalty was assessed by default judgment, but only the statutory minimum penalty of $250 per violation was assessed. The total penalty was large because the case involved 996 violations.

V. ABILITY TO PAY

A. Relevance of Respondent's Fifth Affirmative Defense

Respondent has raised as an affirmative defense the issue of his ability to pay the penalty proposed by the Complainant. Respondent was granted leave to file an amended answer raising the defense of inability to pay. On August 29, 1997, Respondent filed his Third Amended Answer to the Complaint and specifically raised inability to pay as his Fifth Affirmative Defense. Respondent asserts that

> he would be unable to pay a fine in the amount sought by the government. In fact, Respondent Dominguez could not hope to pay during the remainder of his lifetime a fine approaching the amount sought by the government. Further, the imposition of a large penalty would seriously interfere with the Respondent's familial obligation to support and educate his children.

Ans. ¶ 12. Therefore, Respondent asks that I consider these factors in imposing a penalty in this case.

In its posthearing brief, Complainant continues to object to any consideration of Respondent's ability to pay. Cbr. 32-40. Specifically, Complainant asserts that: (1) accepting this affirmative defense would require the Court to decide questions of fact and law relating to debt collection; (2) if this defense is deemed relevant, the Court cannot rule on the merits without addressing the availability of substantial property interests fraudulently conveyed to Bertha Dominguez; and (3) even aside from the fraudulent conveyance, Respondent has failed to meet his burden of persuasion. Cbr. 32-33.

Although I already have ruled prior to trial that I would allow Respondent to raise this issue as an affirmative defense, have permitted Respondent to present evidence on this issue, and have stated that I would consider this issue, in view of Complainant's persistent objection, I will further elaborate on this issue.

The relevancy of the ability to pay defense has not been raised in past document fraud cases, almost all of which have involved very few documents, with either a minimum or small assessed civil money penalty. See, e.g., United States v. Davila, 7 OCAHO 936 (1997), 1997 WL 602730 (1 document-$1,000 penalty); United States v. Lingan & Tabir, 6 OCAHO 914 (1997), 1997 WL 176824 (1 document-$250 penalty); United States v. Ortiz, 6 OCAHO 905 (1996), 1996 WL 789041 (1 document-$250 penalty); United States v. Ortiz, OCAHO Case No. 96C00024 (Jan. 23, 1997), 1997 WL 602707 (1 document-$250 penalty); United States v. Palominos-Talavera, 6 OCAHO 896 (1996), 1996 WL 762115 (1 document-$250 penalty); United States v. Tincoco-Medina, 6 OCAHO 890 (1996) (1 document-$800 penalty); United States v. Leon-Gutierrez, 6 OCAHO 875 (1996), 1996 WL 554455 (2 documents-$500 total penalty); United States v. Kumar, 6 OCAHO 833, 1996 WL 198124 (1 document-$250 penalty), petition for review filed, No. 96-70300 (9th Cir. 1996);

United States v. Zapata-Cosio, 5 OCAHO 774 (Ref. No. 822) (1995), 1995 WL 813120 (2 documents-$500 total penalty); United States v. Noorealam, 5 OCAHO 611 (Ref. No. 797) (1995) (CAHO Modification), 1995 WL 714435 (7 documents-$1,750 total penalty); United States v. Limon-Perez, 5 OCAHO 601 (Ref. No. 796) (1995), 1995 WL 714427 (2 documents-$500 total penalty), aff'd, 103 F.3d 805 (9th Cir. 1996); United States v. Galeas, 5 OCAHO 560 (Ref. No. 790) (1995), 1995 WL 705947 (1 document-$250 penalty); United States v. Chavez-Ramirez, 5 OCAHO 408 (Ref. No. 774) (1995), 1995 WL 545442 (2 documents-$500 total penalty); United States v. Flores-Martinez, 5 OCAHO 79 (Ref. No. 733) (1995), 1995 WL 265084 (2 documents-$500 total penalty); United States v. Morales-Vargas, 5 OCAHO 68 (Ref. No. 732) (1995), 1995 WL 265083 (2 documents-$500 total penalty); and United States v. Diaz Rosas, 4 OCAHO 985 (Ref. No. 702) (1994), 1994 WL 752313 (1 document-$500 penalty). Since the penalties in all these document fraud cases were less than $2,000, it is not surprising that inability to pay was not raised as a defense.

There are two prior document fraud cases that involved numerous violations with a substantial civil money penalty. In United States v. Morales-Guzman, 5 OCAHO 547 (Ref. No. 787) (1995), 1995 WL 706041, there were 996 counterfeit documents, and the penalty assessed was for the statutory minimum $250 per document, for a total penalty of $249,000. However, in Morales-Guzman, Respondent never filed an answer to the complaint, and, therefore, the Court granted the government's motion for default judgment. Therefore, neither ability to pay nor any other possible defenses to the action or requested penalty were asserted or adjudicated. In United States v. Noriega-Perez, 6 OCAHO 859 (1996), 1996 WL 454997, Respondent was assessed the maximum penalty of $2,000 for each of the eight temporary immigration documents that he counterfeited and was assessed a penalty of $250 for the 320 counterfeit I-94 documents that he possessed, for a total penalty of $96,000. Noriega-Perez was a contested action, but the respondent appeared pro se and never raised a defense of inability to pay. Therefore, although substantial penalties were imposed in both Morales-Guzman and Noriega-Perez, in neither case did the respondent assert, or the Court consider, the relevancy of respondent's ability to pay the civil money penalty.

Although the issue of ability to pay has not previously been raised or addressed in an OCAHO section 1324c proceeding, there is ample OCAHO precedent as to the relevancy of ability to pay in civil money cases brought by the INS for employer sanctions cases brought pursuant to 8 U.S.C. § 1324a. Indeed, the relevance of the issue of ability to pay was established in the early stages of OCAHO case law, beginning with United States v. Sophie Valdez d.b.a. La Parrilla Restaurant, 1 OCAHO 598 (Ref. No. 91) (1989) (Frosburg, J.), 1989 WL 433882, and United States v. Felipe, Inc., 1 OCAHO 626 (Ref. No. 93) (1989) (Schneider, J.), 1989 WL 433965. In Felipe, the INS contended that the Judge should not have considered the business' ability to pay or the business' profitability because neither profitability nor ability to pay were mentioned in the statute.[42] Because the statute did not specifically reference ability to pay, INS argued that Congress did not intend that it be considered. Both the Judge and the CAHO rightly rejected this argument, concluding that there

[42] The INS did not argue in Felipe, as it does here, that considering ability to pay would inject OCAHO into the realm of debt collection that is within the jurisdiction of the appropriate U.S. District Court rather than this agency.

was no evidence that Congress purposefully omitted "ability to pay" from the statutory considerations. The CAHO concluded that the INS was mistaken in its interpretation of case law, declaring that it was not evident that Congress deliberately excluded ability to pay from the statutory considerations. Similarly, with respect to section 1324c, Complainant has not cited any legislative history to show that Congress intended to exclude any consideration of a respondent's ability to pay the civil money penalty in section 1324c proceedings.

Since the Felipe decision, ability to pay the penalty has been considered in many subsequent OCAHO employer sanction decisions. In United States v. MTS Service Corp. d/b/a Maggie's Catering Mexico Tipico Restaurant, 3 OCAHO 537, 540 (Ref. No. 448) (1992), 1992 WL 535585, Judge Morse held that the five statutory penalty factors in 8 U.S.C. § 1324a(e)(5) were not exclusive and that the respondent's inability to pay was relevant.[43] Ability to pay has been recognized as a relevant issue in many other subsequent decisions as well. See United States v. Giannini Landscaping, Inc., 3 OCAHO 1730, 1740 (Ref. No. 573) (1993), 1993 WL 566130; United States v. Riverboat Delta King, 5 OCAHO 126, 131 (Ref. No. 738) (1995), 1995 WL 325252; United States v. Mark Carter d/b/a Dixie Industria l Service Co., 7 OCAHO 931 (1997), 1997 WL 602725. Moreover, in some OCAHO decisions inability to pay has been a factor in mitigating the amount of penalty. See United States v. Chef Rayko, Inc., 5 OCAHO 582, 594 (Ref. No. 794), 1995 WL 807190, modified by CAHO on other grounds, 5 OCAHO 582 (Ref. No. 794) (1995), 1995 WL 714311; United States v. Minaco Fashions, Inc., 3 OCAHO 1900, 1903 (Ref. No. 587) (1993), 1993 WL 723360; United States v. Benjamin P. Raygoza, dba Cielito Lindo Restaurant, 5 OCAHO 48, 52 (Ref. No. 729) (1995), 1995 WL 265080. Thus, even though the statute does not explicitly provide that ability to pay is a relevant defense, the decisions by both the Administrative Law Judges and the CAHO have recognized the relevancy of this issue in section 1324a cases.

Complainant has failed to discuss or even acknowledge the existence of this long line of cases. Rather, it inaccurately refers to Respondent's inability to pay defense as a "novel" affirmative defense that would create "new law." Cbr. 33. Complainant has failed to discuss why the reasons for considering ability to pay in those section 1324a cases should not be considered in section 1324c cases. Indeed, if anything, there may be more reason to consider ability to pay in the latter cases, since most section 1324c cases are brought against individuals, whereas section 1324a cases generally are brought against corporations or other business associations. Given Complainant's abject failure to discuss pertinent case law or to explicate why that case law should not be applied here, I expressly reject Complainant's assertion that ability to pay the proposed penalty is irrelevant.

Furthermore, OCAHO is in accord with federal case law and other federal agencies that consider a respondent's ability to pay as a relevant consideration. Indeed, it has been held to be reversible error to refuse to consider a respondent's ability to pay. In Clifton Power Corp. v. Federal Energy Regulatory Commission, 88 F.3d 1258 (D.C. Cir. 1996), FERC had refused to consider

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[43] Judge Morse rejected respondent's assertion in that case not because ability to pay was irrelevant, but because respondent's financial inability claim was undocumented. MTS, 3 OCAHO at 540.

record evidence of plaintiff's operating expenses and net revenues when determining penalty for failure to timely install stream-flow measuring devices. Clifton argued that the FERC acted improperly when it refused to consider Clifton's ability to pay the assessed penalty. The D.C. Circuit Court of Appeals vacated the penalty and remanded it to the FERC for reassessment. Although the ability to pay is not listed in the Federal Power Act as a factor that the Commission must consider in assessing penalties, the circuit court held that the FERC could not solely take into account the gross revenues of the corporation, while ignoring the unrebutted testimony concerning the corporation's net revenues when assessing inability to pay. The Court further held that it was arbitrary and capricious for the FERC to initially base its proposed penalty on the gross revenue of the facility.

Similarly, the Seventh Circuit Court of Appeals has recognized the validity of an inability to pay defense. Although the Circuit Court in Krueger v. Cuomo, 115 F.3d 487 (7th Cir. 1997), affirmed the decision and order of the Secretary of Housing and Urban Development (HUD), it recognized that inability to pay was a proper defense. It rejected the defense in that case because it held that difficulty in paying is not an inability to pay, and thus the landlord, having violated the Fair Housing Act by sexually harassing a tenant, would have to sell one of the four properties to satisfy the fine. The Circuit Court said that the penalty was not too severe for that type of violation and further noted that "difficulty paying [a fine] is not inability to pay [the fine], and a painless sanction would have little deterrent effect." Id. at 493. Nevertheless, the Court's decision recognizes the appropriateness of such a defense.

Similarly, in United States v. J.B. Williams Co., Inc., 498 F.2d 414, 438 (2d Cir. 1974), a civil money penalty proceeding based on a violation of a Federal Trade Commission cease and desist order, the Court held that the size of the penalty should be based on a number of factors, including the good or bad faith of the defendants, the injury to the public, and the defendants' ability to pay. In United States v. Barkman, 784 F. Supp. 1181 (E.D. Penn. 1992), the District Court also considered the issue of inability to pay. That case involved civil money penalties imposed against the operator of a land fill pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The Court held that Barkman could pay a substantial penalty, and discounted the testimony of Barkman's certified public accountant because he relied on the defendant's data and made no independent investigation or review.

Ability to pay also has been considered in other federal agency proceedings. See, e.g., FAA v. East Coast Aero Club, Inc., FAA Docket No. CP96NE0139, 1997 FAA Lexis 556 (May 9, 1997) (defense recognized but rejected for lack of evidence); In the Matter of Staryk, CFTC Docket No. 95-5, [1994-1996 Transfer Binder] (CCH) ¶ 26,701 (Dec. 18, 1997). Thus, the case law from these circuit, district, and administrative opinions validates the relevancy of the issue of ability to pay in a civil money penalty proceeding.

In this regard, it is instructive to consider that ability to pay also is considered when setting a criminal fine. Obviously, a larger penalty is necessary to punish or deter wealthy individuals. The United States Sentencing Commission recognizes this point in its Guidelines Manual. Among the

factors that are considered in setting a criminal fine, the U.S.S.G. provide that the court shall consider the defendant's ability to pay the fine (including the ability to pay the fine over a period of time) in light of his earning capacity and financial resources. The U.S.S.G. do not limit the type of evidence allowed to prove inability to pay, and, since ability to pay is an equitable consideration, the court has a large measure of judicial discretion when considering this issue.

Complainant argues that ability to pay is relevant in criminal cases, but not civil or administrative proceedings, because in criminal cases the failure to pay the fine could impact on the amount of prison time served. Cbr. 39. I specifically reject Complainant's assertion that the issue of ability to pay should be limited to a criminal document fraud case, and not applied in a civil or administrative document fraud proceeding. Both the criminal and civil document fraud proceedings are meant to punish and deter. Therefore, in determining how much penalty is necessary to deter and to punish, a respondent's ability to pay is pertinent.

Complainant also asserts that accepting the existence of this affirmative defense would require the Court to decide questions of fact and law relating to debt collection that are within the jurisdiction of the appropriate U.S. District Court rather than OCAHO. Cbr. 32. Complainant asserts that a claim of inability to pay a civil judgment is simply a claim that the judgment is uncollectible. Without citing any case law in support of its position, Complainant asserts that Administrative Law Judges do not have jurisdiction to decide collection matters relating to the final orders they issue because that responsibility is granted to U.S. District Judges. Finally, Complainant asserts, again without any supportive citation, that accepting the affirmative defense would create new law by accepting for the first time the "novel" affirmative defense of inability to pay.

Complainant's assertion that an inability to pay defense would be a "novel" idea that would intrude on the jurisdiction of the federal district court is itself a "novel" argument that Complainant did not assert prior to its posthearing brief, and that, to my knowledge, has not been asserted by the INS in employer sanction cases, and, in any event, that has not been accepted in any OCAHO opinion.[44] Moreover, as shown by the number of employer sanction cases in which ability to pay has been recognized as a valid defense, Complainant's assertion is at odds with the prevailing case law. Further, as discussed previously, not only do Administrative Law Judges in OCAHO consider ability to pay, but that defense has been recognized in other federal administrative proceedings. Therefore, I reject Complainant's assertion that Administrative Law Judges do not have the jurisdiction or authority in a document fraud case to consider an affirmative defense based on ability to pay the civil money penalty.

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[44] Also, Complainant does not cite, and I am unaware of, any case law from this or any other federal agency that supports its contention that an Administrative Law Judge may not consider ability to pay because it would intrude on the U.S. District Court's jurisdiction to consider debt collection issues.

B. Divorce as a Fraudulent Conveyance

Complainant further argues that the Court cannot consider the issue of Respondent's ability to pay without addressing the availability of substantial property interests fraudulently conveyed to Bertha Dominguez during this litigation, and, since Respondent has failed to show that these assets were not fraudulently conveyed, that the assets conveyed to Bertha Dominguez pursuant to the divorce decree should be considered available to Respondent to pay the civil money penalty, and that the affirmative defense should be rejected. Cbr. 32-33. Complainant contends that 28 U.S.C. § 3301 et seq. of the U.S. Code applies uniform federal rules to fraudulent transfers involving debts to the United States, and that a transfer is fraudulent if the transfer was made with actual intent to hinder, delay or defraud a creditor or if, without receiving a reasonably equivalent value for the transfer, the debtor believed or reasonably should have believed that he was incurring debts beyond his ability to pay. Complainant contends that it has become a creditor of Respondent because it has a claim against him under the very broad definition of claim,[45] even though it has not been reduced to judgment and that respondent's property settlement with Bertha Dominguez was a "transfer"[46] within the meaning of section 3301. Cbr. 34.

Without citing any authority for this proposition, Complainant seeks to shift the burden of proof to Respondent to show that his divorce, and the property settlement, were not fraudulent. The government has the initial burden under 28 U.S.C. § 3304 to show the probable validity of the debt and to show that a prejudgment transfer was fraudulent. United States v. Teevan, 862 F. Supp. 1200, 1217 (D. Del. 1992). Complainant cites no case law to support its assertion that a notice of intent to fine or a proposed civil money penalty in a complaint creates a "right to payment," within the meaning of 28 U.S.C. § 3301(3) (1994), or should be considered a "debt"[47] to the United States within the meaning of 28 U.S.C. § 3304 (1994). The penalty proposed in the NIF and in the

[45] Under the statute, "'[c]laim' means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 28 U.S.C. § 3301(3) (1994).

[46] The statutes defines "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." 28 U.S.C. § 3301(6) [sic - probably should be numbered § 3301(8)] (1994).

[47] Although Complainant states that the federal fraudulent transfers statute defines "claim" very broadly, see Cbr. 34, the statute speaks in terms of a debt to the United States, see 28 U.S.C. § 3304 (1994). The statute provides no definition of "debt," see id. § 3301, and neither does Complainant.

Complaint merely reflect the amount of fine or penalty that the INS believes is appropriate, but no right to payment or debt to the United States of any kind is created until the initial decision is issued by the Administrative Law Judge.[48]

Complainant further argues that the Court cannot consider Respondent' ability to pay without considering the availability of substantial property interests fraudulently conveyed to Bertha Dominguez during this litigation. Complainant suggests that the divorce and property settlement was a "sham" because it was not initiated until after this proceeding commenced, that Respondent and his wife reached a voluntary property settlement, that the claim of the United States never was revealed to the Texas state court, and that the property settlement was not equitable, since Respondent "appears to have received substantially less value in the uncontested transaction than his wife." Cbr. 35-37.

First, Complainant has sought the wrong forum in which to attack the validity of the divorce decree. An attack on the validity of a divorce decree must be brought in the court that entered the decree and may not be collaterally challenged in a different forum. See Little v. Celebrezze, 259 F. Supp. 9 (N.D. Texas 1966). As noted in Little, this is a jurisdictional issue. Id. at 11. Further, both Texas and federal authorities recognize that only void judgments, as opposed to voidable judgments, may be collaterally attacked, and that only judgments that show a jurisdictional defect on the face of the record are classified as void judgments. Id. The Court in Little concludes that "a divorce decree must be attacked only in the court which granted it, and that it is a matter of jurisdiction." Id. Thus, OCAHO has no authority to question the validity of the Texas divorce decree.

Further, even if OCAHO had such authority, I find that Complainant has misrepresented the record and exaggerated the imbalance in the divorce decree. For example, Complainant asserts that Respondent "conveyed to his wife any interest in other property of value, including seven pieces of real property . . . life insurance policies (including cash values), stocks, stock options, bonds, securities, jewelry, sums of cash, money due from a sale of real property proceeds rights relating to a profit sharing retirement pension, bonuses and other employment benefits, along with two vehicles." Cbr. 26 (CPFF I.18). In fact, the property settlement on its face appears quite evenly balanced. Mrs. Dominguez was awarded as sole property seven items of real property, but

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[48] As previously held in United States v. Curran Engineering Co., Inc., 7 OCAHO 975 (1997), 1997 WL 751153, the issuance by INS of the Notice of Intent to Fine (NIF) does not constitute the commencement of an adjudicatory proceeding under 28 U.S.C. § 1324a. Similarly, a NIF does not mark the commencement of an adjudicatory proceeding under 28 U.S.C. § 1324c. Cf. United States v. Davila, 7 OCAHO 936, at 13-16, 1997 WL 602730, appeal filed, No. 97-60457 (5th Cir. 1997). Hence the fine proposed in the NIF does not create a "debt" to the United States in those instances in which a party requests a hearing before an ALJ. Moreover, the penalty sought in the complaint filed with OCAHO merely constitutes a request by a party and is not a debt or obligation incurred by the respondent.

Mr. Dominguez received six such properties, including the Boerne Stage Road property.[49] Further, although Complainant suggests that there was a transfer of life insurance policies, stocks, bonds, securities, etc., in fact the divorce decree provides that both parties would receive life insurance (including cash values), stocks, bonds, securities, and bank accounts that were registered in their respective names; i.e., each spouse would retain what each owned. Further, although Mrs. Dominguez obtained two motor vehicles (the 1985 Ford truck and the 1991 Ford Mustang), Mr. Dominguez was awarded the 1993 Chevrolet truck, which was the latest model year motor vehicle. Each party also assumed certain specified debts. "Reasonably equivalent value" does not require exact mathematical equivalence. In re WCC Holding Corp., 171 B.R. 972 (Bkrtcy. N.D. Tex. 1994). Thus, on its face, the property settlement does not appear unfair, much less fraudulent.

Complainant also fails to acknowledge that Texas is a community property state. Under Texas law in a decree of divorce or annulment, the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children in the marriage. TEX. FAMILY CODE ANN. § 7.001 (West 1997). Texas law specifically provides for written property agreements, stating that "[t]o promote amicable settlement of disputes in a suit for divorce or annulment, the spouses may enter into a written agreement concerning the division of the property and the liabilities of the spouses and maintenance of either spouse." Id. § 7.006. If the Texas court finds that the terms of the written agreement in a divorce or settlement are just and right, the court will approve the agreement and it will either be set forth in full or incorporated by reference in the final decree. Here, the Texas court approved the property settlement between Pedro Dominguez and Bertha Dominguez, and it was made part of the divorce decree.

The property settlement did not specify the respective value of the real property, the amount in the bank accounts, or the value of the various securities held by each party. Although Complainant could have sought to show that the property settlement was unfair because the value awarded to each party greatly differed, Complainant failed to do so. Complainant did not seek to offer any testimony on the property settlement or other evidence to show that the respective division of the property was unfair or unreasonable.[50] Moreover, its proposed findings on this issue are not supported by the record. As to some proposed findings, it is unclear how Complainant reached the proposed figures (e.g., the claim in CPFF 20 that the property awarded to Bertha Dominguez was

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[49] Complainant states that in the property settlement Respondent only received six of the seventeen properties that he listed in 1994. Cbr. 26. While it is literally true that Respondent received six properties in the divorce settlement, see RX-SS-5-6, it also is true that Mrs. Dominguez only received seven properties, see RX-SS-2-3, one more than Respondent received. Other properties already had been sold, apparently in order to enable Respondent to pay his debts.

[50] Although Complainant was afforded the opportunity for a rebuttal case, it only called one witness and offered no documentary evidence in rebuttal. In particular, it did not offer any evidence on the issue of fraudulent conveyance.

valued at $203,839 in 1994[51]). Thus, even if this were the proper forum to consider the issue, Complainant has utterly failed to show that the divorce was a sham or that the property settlement constitutes a fraudulent conveyance.[52]

C. Burden of Proof

As I previously have ruled, Respondent bears the burden of proof with respect to affirmative defenses, including the affirmative defense of inability to pay. This ruling is consistent with prior OCAHO case law. In addressing the question of who bears the burden of proof with respect to affirmative defenses generally, OCAHO case law has concluded that, while complainant bears the burden of proof with respect to the allegations of the complaint, the burden of proving an affirmative defense raised in the answer rests on the respondent.

In U.S. v. Alvand, Inc. D/b/a 410 Diner, 2 OCAHO 388, 393 (Ref. No. 352) (Myatt), 1991 WL 717202, modified by CAHO, 2 OCAHO 378, 382 (Ref. No. 352) (1991) (Perkins), 1991 WL 531714, the Court stated that "in IRCA proceedings, the Complainant bears the ultimate burden of proving the allegations of the complaint by a preponderance of the persuasive evidence." Alvand, 2 OCAHO at 393 (citing 28 C.F.R. § 68.50(b) (1991)[53]; Compagnie des Bauxites de Guinee v. Insurance Co. of North America, 551 F. Supp. 1239 (D.C. Pa. 1982)). The Court further stated that, "while this ultimate burden never varies, the burden of producing or going forward with evidence may shift between the parties in accordance with certain well defined rules." Alvand, 2 OCAHO at 393 (citing United States v. Marcel Watch Corp., 1 OCAHO 988 (Ref. No. 143) (1990) (Morse), 1990 WL 512157 (burden of proof in IRCA discrimination proceedings)), aff'd, Alvand, 2 OCAHO at 382. "In IRCA sanction cases, just as in other types of civil proceedings, the party with the best knowledge, or which is in the best position to present the requisite evidence, normally bears the burden of evidence production." Alvand, 2 OCAHO at 393 (citing United States v. Continental Ins. Co., 776 F.2d 962 (11th Cir. 1985); Lindahl v. Office of Personnel Management, 776 F.2d 276 (D.C. Cir. 1985)), aff'd, Alvand, 2 OCAHO at 382. "In addition, the party asserting the affirmative of a proposition normally bears the burden of evidence production as to that proposition." Alvand, 2 OCAHO at 393 (citing Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979)), aff'd, Alvand, 2 OCAHO at 382.

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[51] Complainant cites the 1994 Presentence Investigation Report (RX-D), but the property descriptions in the report do not entirely match those described in the divorce decree (RX-SS).

[52] Although Complainant questions the divorce as an attempt by Respondent to shield his assets from this lawsuit, Complainant has failed to elicit evidence that the divorce was not bona fide. Certainly, the fact that the divorce occurred during the pendency of this proceeding, without more, is not evidence that the divorce was a sham or intended to shield Respondent's assets. Moreover, the property settlement entered into by Respondent and his wife pursuant to the divorce did not assign all or almost all assets to the wife, as Complainant asserts.

[53] 28 C.F.R. § 68.50(b) (1991) is currently 28 C.F.R. § 68.52(b) (1997).

In modifying the decision on review, the CAHO stated as follows: "[a]lthough IRCA, its legislative history, and the applicable regulations provide little, if any, guidance as to the burden of proof necessary to establish an affirmative defense, some direction can be gleaned from federal case law. A standard used by some courts is the preponderance of the evidence standard." Alvand, 2 OCAHO at 382 (citing Martin v. Weaver, 666 F.2d 1013, 1019 (6th Cir. 1981) (affirmed the general proposition that the "burden of proving an affirmative defense by a preponderance of the credible evidence is on the party asserting the defense"); U.S. v. Wiring, 646 F.2d 1037, 1042-43 (5th Cir. 1981)). The CAHO adopted the standard in the Wiring case, concluding that the respondent who asserts an affirmative defense must establish that defense by a preponderance of the evidence. Alvand, 2 OCAHO at 382-83.

Furthermore, with respect to the specific issue of the burden of proof with respect to ability to pay, I have ruled in a prior employer sanctions case that the burden of raising and proving, by a preponderance of the evidence, an inability to pay rests on the respondent. United States v. American Terrazzo Corp. dba John De Lallo Foods, 6 OCAHO 877, at 17 (1996), 1996 WL 914005; Carter, 7 OCAHO 931, at 45, 1997 WL 602725, at *33. Similarly, here, Respondent has the initial burden of presenting a prima facie case, as well as the ultimate burden of persuasion, on the defense of inability to pay.

D. Sufficiency of Respondent's Evidence

In determining whether Respondent is able to pay the civil money penalty, the issue is whether he has proven he is unable to pay a civil money penalty of $187,050, not the $388,000 penalty proposed by Complainant in its posthearing brief. Respondent has offered both documentary and testimonial evidence in support of his Fifth Affirmative Defense. The documentary evidence consists of the final decree of divorce between Respondent and his wife, which became final on March 10, 1997, and settlement statements for three different real estate properties in Texas. Respondent also testified as to his assets, liabilities, income and expenses.

In his posthearing brief, Respondent contends that his total assets are $49,300[54] and that his liabilities amount to $22,5456 (sic). Rbr. 17. Specifically, he contends that although the market value of the Los Encinos real estate (Boerne Stage Road property) is $480,000, his equity in the property is only $40,000. He also estimates that the market value of the other real estate is only $6,800. When offset against his liabilities, his net assets would be only $26,755.

Respondent also estimates that his total monthly income is approximately $2,606, which consists primarily of his portion of his federal pension (pursuant to the divorce settlement he receives sixty percent of the pension, or $1,853 per month) and his income as a supervisor at Winfield's restaurant and motel. Rbr. 15. He also receives $3,500 in rent from the Boerne Stage Road

[54] In his testimony, Respondent estimated the value of the other real estate properties as $800 for the property in Zapata County and $6,000 for the property in Dilley, Texas. Tr. at 421, 426.

property, which would increase his monthly income to $6,106. He estimates that his monthly expenses, which include the payments on the Boerne Stage Road property ($4,314) and the college tuition and other expenses he pays for his daughters, amount to $6,800. Rbr. 16. Although this would mean that Respondent has a net loss each month, in his brief he acknowledges that, by discontinuing payment of college and living expenses for his daughters, he would be able to reduce his expenses by $537 per month, and he would have a net monthly income of $500 per month over and above his expenses. Rbr. 16.

To be frank, Respondent's calculations do not compute. It is difficult to see how Respondent reached the figure of $500 net income per month, and it illustrates the problems with Respondent's evidence. Even if one deducts the portion of living expenses for the daughters estimated by Respondent at $537, he still would have a net monthly loss. Further, deducting the college tuition would not provide a net monthly income of $500.

Respondent contends that he is unable to pay a civil money penalty exceeding $35,000. Respondent's evidence indicates that he has a net worth of approximately between $27,944 and $35,944. His statement of income and expenses shows that his monthly expenses exceed his income by $192, which on an annual basis would constitute a net loss of $2,304. Thus, were Respondent's evidence credited, it would suggest that he is unable to pay the $187,050 penalty assessed in this decision, or indeed any substantial penalty. However, for the reasons discussed below, I do not credit his evidence.

First, Respondent was not a forthright or credible witness. For example, on cross-examination he denied that Winfield's Restaurant and Motel is his business or that he runs the restaurant. Tr. at 493-94. He also denied that business has been very good and further denied that the motel is full every night, or that he was contemplating opening another restaurant. Tr. at 495-96. He also denied expressing that opinion to other people. Tr. at 497-98. However, during Complainant's rebuttal case, INS Agent Roy Hall testified that he, and Border Patrol Agent Rolando Salinas, stopped at Winfield's Restaurant on December 5, 1997. Tr. at 513. Agent Salinas, who knows Respondent, referred to Winfield's as "Pete Dominguez's place." Tr. at 514. Moreover, Agent Hall testified that Respondent came over to their table and began talking to Agent Salinas. During the conversation Respondent referred to the restaurant as his own and stated that business at the restaurant really had picked up and that the motel was full every night. Tr. at 515-16. He also stated that he wanted to open another restaurant. Tr. at 516. Agent Hall also saw Respondent giving instructions to one of the employees working there. Tr. at 517. I found Agent Hall to be a credible witness, and I accept his testimony.

I also fault Respondent's evidence because he did not separate his own expenses from those of his family. Although Respondent estimated a gasoline bill of $400 per month, and a car insurance payment of $326 per month, Tr. at 447-49, this includes gasoline and insurance for two of his adult children. While it is commendable that Respondent attempts to aid his children, since he has no

legal obligation to support adult children, their expenses cannot be considered in determining his ability to pay the civil money penalty. Since he did not separate the expenses, these costs may not be considered.

Aside from the above, there are far more serious problems with Respondent's evidence. The fundamental flaw in Respondent's evidence is that it is based almost entirely on self-serving testimony that has not been substantiated with written evidence. For example, although he has testified as to his expenses for gasoline, utilities, insurance, food, etc., he has not even attempted to offer any documentary evidence (e.g., bills, receipts, canceled checks, etc.) to support his testimony. As such, I cannot give any substantial credence to these assertions. Although Respondent had listed certain tax returns on his proposed exhibit list, he did not offer these documents in evidence, and, consequently, they are not part of the record.[55] Moreover, Respondent did not list as exhibits, or offer in evidence, his most recent income tax returns. He did not offer any bank statements, or any evidence of other financial accounts. Indeed, there was not even any testimony offered as to such accounts. It is inconceivable that Respondent has no such accounts, but, if they do not exist, at least it was incumbent on Respondent to so state.

Further, aside from the fact that Respondent did not offer substantiating written documentation, he also did not offer any corroborating testimony as to his financial status. In prior witness lists, Respondent had listed the following as potential witnesses: C.W. Dickey, a certified public accountant who was described in the witness list as a potential witness as to Respondent's ability to pay a fine, Respondent's financial status, and Respondent's financial and income tax records; Michael M. Trott, a real estate appraiser who was expected to testify as to the market values of the real estate owned by Respondent and his wife; Paul Montessoro, who was expected to testify as to the effect of a fine on Respondent's financial status; and John Allen Shull, Jr., of the CNMC Mortgage Company, who was listed as a potential witness to testify as to the loan value of the property on Boerne Stage Road. In fact, none of these witnesses were called at the hearing. The purported reason they were not called is that these were expert witnesses, and Respondent could not afford to pay for their services. Regardless, it is Respondent's burden to prove an affirmative defense, and, if he fails in that proof, the burden is not sustained. Further, although he may have lacked the means to call all or any of these expert witnesses, that would not explain his failure to offer any substantiating written documentation, such as bills, receipts, bank statements, etc., to support his oral testimony. In essence, his asserted inability to pay defense rests solely on his own self-serving, unsubstantiated testimony supported only by the divorce decree and some real estate documents.

Respondent asserts in his brief, see Rbr. 16, that the owner of real estate is qualified to give an opinion as to the value of his property without further qualification, citing United States v. 329.73 Acres of Land, 666 F.2d 281, 284 (5th Cir. 1982) [hereinafter "Acres"]. However, in Acres, unlike here, the owner did not rely entirely on his own valuation of the property. Although the appellate

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[55] The 1991 thru 1993 tax returns were listed as proposed exhibits. See Respondent's Exhibit List, RX-J thru RX-P.

court noted that the owner's valuation of his property was admissible, the court noted that the owner also had called two expert witnesses who offered opinions. Thus, the owner was not seeking to rely solely on his own valuation, as is the situation here.

As noted previously, in asserting an inability to pay defense, Respondent bears a dual burden of proof; namely, the burden of going forward and the burden of persuasion. The government is required to respond only if the Respondent presents a prima facie case. Here, Respondent has failed to come forward with relevant evidence and also has failed in his burden of persuasion. For that reason, I reject the Fifth Affirmative Defense and conclude that Respondent has failed to show an inability to pay a civil money penalty of $187,050.

VI. EXCESSIVE FINES CLAUSE

Respondent raises the excessive fines clause of the Eighth Amendment[56] as a defense to the penalty in this case. Ans. ¶ 9 (Second Affirmative Defense). Respondent concedes, however, that a penalty in the minimum mandated by statute would not be unconstitutionally excessive under the facts of this case. Rbr. 22. I have not imposed a civil money penalty in the minimum amount, so I examine whether a fine of $187,050 would be constitutionally excessive; I conclude that it is not.

The excessive fines clause applies to civil, as well as to criminal, fines. See Austin v. United States, 509 U.S. 602, 607-09 (1993) (applying the clause to an in rem civil forfeiture proceeding and explaining, inter alia, that the language of the Eighth Amendment does not limit the excessive fines clause to criminal proceedings). The excessive fines clause applies to sanctions that constitute "punishment." See Austin, 509 U.S. at 610. Complainant correctly acknowledges that the excessive fines clause is not limited to criminal punishments. See Cbr. 40-42, n.1.

If the civil money penalty in this case "serv[es] in part to punish," Austin, 509 U.S. at 610, then I must proceed to the question of whether that civil money penalty is excessive. Since this penalty is intended to punish and deter, see Tr. at 323, 396; 136 Cong. Rec. S13616-05, S13628 (Sept. 24, 1990) (Statement by Senator Alan Simpson (R. Wyo.) that "I am today introducing legislation which would do the following: . . . create a system of civil fines to deter users of fraudulent documents") (emphasis added), the Eighth Amendment's excessive fines clause applies to sanctions for document fraud under section 1324c.

Complainant argues that whether "punishment" exists should be determined by examining whether the fine imposed is unreasonably disproportionate to the costs incurred by the government as a result of the offense, relying on United States v. Halper, 490 U.S. 435, 449-52 (1989). See Cbr. 40-41. The Supreme Court, however, recently has broadly discredited that approach taken in Halper to decide whether a fine constituted punishment for purposes of the double jeopardy clause. See Hudson v. United States, 118 S. Ct. 488, 494-95 (1997). Even though the Court rejected the

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[56] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII.

Halper analysis in the double jeopardy context in which it originated, I am loathe to use it for any purpose given the sound criticism it has received so recently at the hands of the Supreme Court. Additionally, I have found no case in which the Supreme Court has used, adopted, or otherwise approved the Halper analysis for purposes of deciding whether punishment existed to trigger the Eighth Amendment excessive fines clause. Complainant cites Austin, in addition to Halper itself, for the proposition that "[a] fine that is not unreasonably disproportionate to the costs incurred by the Government as a result of the offense is not 'punishment.'" See Cbr. 40. Austin, however, does not use the Halper approach (of comparing the amount of the fine to the costs incurred by the government) to decide whether punishment existed to trigger application of the excessive fines clause; instead, Austin looks to the historical and contemporary understandings of civil in rem forfeitures and the intent of Congress in enacting the forfeiture provisions at issue in deciding whether such sanctions entail some element of punishment and, thus, receive Eighth Amendment protection. See Austin, 509 U.S. at 610-22; see also United States v. Ursery, 116 S. Ct. 2135, 2146 (1996) ("We acknowledged in Austin that our categorical approach under the Excessive Fines Clause was wholly distinct from the case-by-case approach of Halper . . . .") (emphasis added). Additionally, at a time when Halper's approach still was recognized, the Court indicated that the standard for deciding whether punishment existed for double jeopardy purposes was different from the standard for deciding whether punishment existed for excessive fines clause purposes. See id. at 2147 (just because the civil in rem forfeitures at issue "are subject to review for excessiveness under the Eighth Amendment after Austin . . . does not mean . . . that those forfeitures are so punitive as to constitute punishment for the purposes of double jeopardy"). Consequently, CX-CCC, which details the government's expenses in investigating and prosecuting this case, is irrelevant to the analysis of deciding whether there is punishment in this case to trigger application of the Eighth Amendment's excessive fines clause.

Next, it is necessary to decide whether the civil money penalty set in this case is excessive under the Eighth Amendment. "The Supreme Court has not articulated a comprehensive test to determine whether an in personam civil penalty violates the Excessive Fines Clause of the Eighth Amendment." Cole v. United States Dep't of Agriculture, 133 F.3d 803, 807 (11th Cir. 1998). As the Eleventh Circuit points out in Cole, see id., the Supreme Court in Austin, which addressed the excessive fines clause in the context of in rem civil forfeitures, declined to delineate standards for "excessiveness." In Austin, the lower court "had no occasion to consider what factors should inform such a decision because it thought it was foreclosed from engaging in the inquiry." Austin, 509 U.S. at 622. The Court refused to define standards for application of the excessive fines clause, reasoning that "[p]rudence dictates that we allow the lower courts to consider that question in the first instance." Id.

Since Austin, courts have utilized a proportionality test to determine whether fines are excessive under the Eighth Amendment. See Cole, 133 F.3d at 808-09 (applying the proportionality test to a civil monetary fine); Pharaon v. Board of Governors of the Fed. Reserve System, 135 F.3d 148, 156-57 (D.C. Cir. 1998) (applying the proportionality test to a civil monetary fine); United States v. Emerson, 107 F.3d 77, 80, 81 n.9 (1st Cir.) (applying the proportionality test to a civil monetary fine), cert. denied, 118 S. Ct. 61 (1997); United States v. One Parcel Property, 74 F.3d

1165, 1171-72 (11th Cir. 1996) (applying the proportionality test to a civil in rem forfeiture, but recognizing that other courts have adopted an "instrumentality" test or a combination "instrumentality" and "proportionality" test in such cases). Proportionality analysis "compares the seriousness of the offense to the severity of the fine." Cole, 133 F.3d at 808-09; see also Emerson, 107 F.3d at 80 ("Although precedent provides no precise guideposts for evaluating a fine's 'excessiveness,' Justice Scalia has observed that 'the touchstone is value of the fine in relation to the offense.'") (quoting Austin, 509 U.S. at 627 (Scalia, J., concurring)); United States v. Gilbert Realty Co., 840 F. Supp. 71, 74 (E.D. Mich. 1993) (relying on Justice Scalia's remarks in his concurring opinion in Austin).

I agree that the proper reference in measuring excessiveness of a fine under the Eighth Amendment is the relationship between the amount of the fine and the nature of the offense. All relevant circumstances must be considered in making the excessiveness determination, see United States v. Monroe, 866 F.2d 1357, 1366 (11th Cir. 1989) ("The [E]ighth [A]mendment prohibits only those forfeitures that, in light of all relevant circumstances, are grossly disproportionate to the offense committed.") (quoting United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987)), and "[t]he relevant factors [for determining excessiveness] will necessarily vary from case to case," One Parcel Property, 74 F.3d at 1172.

Considering all the circumstances in the present case, the civil money penalty imposed is not disproportionate to the seriousness of Dominguez' conduct and to the damage to law enforcement caused by his conduct. Although a total civil money penalty of $187,050 unquestionably is substantial, it is deservedly so in light of the many aggravating factors in this case. I have found a large number of aggravating factors in this case that warrant imposition of a significant penalty. See supra part IV.B.2. Consideration of all those factors, including Respondent's breach of trust as a law enforcement officer, the resulting impact on law enforcement at the Laredo ASU, and the magnitude of the counterfeiting operation, shows that the imposed penalty is reasonably related to Respondent's conduct. Additionally, I found some mitigating factors and considered them in setting the civil money penalty. See supra parts IV.B.3, 5. I considered all factors, both aggravating and mitigating, that were supported by the evidence, and used them to set a fair and reasonable penalty under the special circumstances of this case. The imposed penalty is not disproportionate to the seriousness of Respondent's offenses and, therefore, does not offend the excessive fines clause of the Eighth Amendment.

VII. CONCLUSIONS AND ORDER

With respect to Count I, Respondent counterfeited and falsely made the documents referenced in paragraphs 1-23, 25-51, 53-59, 61-74, 76-87 and 90-103, in violation of 8 U.S.C. § 1324c(a)(1). Respondent also forged the six documents referenced in paragraphs 2, 3, 25, 26, 27 and 28 in violation of 8 U.S.C. § 1324c(a)(1). With respect to Count II, Respondent provided the counterfeited, falsely made, and/or forged documents referenced in paragraphs 2, 3, 8, 12-13, 18-19, 25-37, 43-49, 53-59, 64-67, 70-72, 76-77, 80, 83, 87, 90, 93-95, 98-100, and 103, in violation of 8 U.S.C. § 1324c(a)(2).

I find in favor of Respondent with respect to paragraphs 24, 52, 60, 75, 88 and 89 of both Counts I and II on the ground that Complainant failed to demonstrate that the I-94 forms referenced in those paragraphs were forged, counterfeited, altered, or falsely made. Respondent did not "alter" any of the I-94 forms referenced in Count I, as that word is used in section 1324c(a)(1). I also find for Respondent with respect to Count II, paragraphs 1, 4-7, 9-11, 14-17, 20-23, 38-42, 50, 51, 61-63, 68, 69, 73, 74, 78, 79, 81, 82, 84-86, 91, 92, 96, 97, 101 and 102, concluding that Complainant has not demonstrated by a preponderance of the evidence that Respondent provided or possessed any of those I-94 documents in a manner contemplated by section 1324c(a)(2). With respect to those documents in Count II, Complainant points to no evidence that shows Respondent possessed them within the meaning of section 1324c, so judgment is entered for Respondent regarding those documents. Judgment also is entered for Respondent with respect to the allegation that Respondent used or attempted to use the documents referenced in Count II.

I assess a civil money penalty of $1,650 for each of the ninety-seven violations found in Count I, which results in a total Count I penalty of $160,050. I assess a civil money penalty of $500 with respect to each of the fifty-four violations found in Count II, for a total Count II penalty of $27,000. Therefore, Respondent is ordered to pay a total civil money penalty of $187,050.[57]

In addition to the civil money penalty, Complainant requests that an order be entered ordering Respondent to cease and desist from further violations of 8 U.S.C. § 1324c. Cbr. 49. Complainant basically seeks to enjoin Respondent from violating the statute. Such a cease and desist order would both be too broad and too vague. According to well established law, a cease and desist order must be crafted carefully so that the party subject to the order can understand what conduct is prohibited. Merely because a party has committed acts in violation of the statute does not justify an injunction or cease and desist order to obey the statute and, thus, subject the respondent to further penalties for some new violation that is unlike and unrelated to the acts with which he originally was charged. See National Labor Relations Board v. Express Pub. Co., 312 U.S. 426, 435-36 (1941) (NLRB not justified in issuing a blanket order restraining the employer from committing any act in violation of the statute). While the cease and desist order is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past, the order's prohibitions should be clear, precise and reasonably related to the unlawful conduct involved in the action. See Federal Trade

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[57] In setting a civil money penalty, Respondent asks me to take into account that "[a] judgment for the amount of a civil fine pursuant to 1324c must contain a provision for post judgment interest pursuant to 28 U.C.S.A. Sec. 1961." Rbr. 6 (RPCL 4). I reject that proposed conclusion. The cited authority provides that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961(a) (1994) (emphasis added). "Section 1961 applies by its terms only to civil cases in the United States district courts." Gulf Oil Corp. v. Federal Power Comm'n, 563 F.2d 588, 610 (3d Cir. 1977) (refusing to apply a portion of section 1961 regarding the date from which interest may run to an order for interest in an administrative proceeding before the Federal Power Commission).

Comm'n v. Colgate-Palmolive Co., 380 U.S. 374, 392, 394-95 (1965). Since an order that merely prohibited the Respondent from continuing to violate section 1324c would be both overbroad and vague, Complainant's requested remedy is rejected.

Respondent is ordered to cease and desist from counterfeiting, forging or falsely making I-94 forms or other immigration-related documents in violation of 8 U.S.C. § 1324c(a)(1). Respondent also is ordered to cease and desist from providing counterfeit, forged or falsely made I-94 forms or other immigration-related documents in violation of 8 U.S.C. § 1324c(a)(2).

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ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

NOTICE REGARDING APPEAL

Pursuant to the Rules of Practice, 28 C.F.R. § 68.53(a)(1), a party may file with the Chief Administrative Hearing Officer (CAHO) a written request for review, with supporting arguments, by mailing the same to the CAHO at the Office of the Chief Administrative Hearing Officer, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2519, Falls Church, Virginia 22041. The request for review must be filed within 30 days of the date of the decision and order. The CAHO also may review the decision of the Administrative Law Judge on his own initiative. The decision issued by the Administrative Law Judge shall become the final order of the Attorney General of the United States unless, within thirty days of the date of the decision and order, the CAHO modifies or vacates the decision and order. See 8 U.S.C. § 1324c(d)(4) and 28 C.F.R. § 68.53(a).

Regardless of whether a party appeals this decision to the Chief Administrative Hearing Officer, a person or entity adversely affected by a final order issued by the Administrative Law Judge or the CAHO may, within 45 days after the date of the Attorney General's final agency decision and order, file a petition in the United States Court of Appeals for the appropriate circuit for the review of the final decision and order. A party's failure to request review by the CAHO shall not prevent a party from seeking judicial review in the appropriate circuit's Court of Appeals. See 8 U.S.C. § 1324c(d)(5) and 28 C.F.R. § 68.53(a)(3).